88-865

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUN EXPLORATION AND PRODUCTION COMPANY, *et al.*,

Petitioners

AND

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,

V.

JAMES R. CONNER, *et al.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES L. KAISER
(Counsel of Record)
MARY A. VIVIANO
Suite 4700
370 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

Counsel for Petitioners

1:30 PM

QUESTIONS PRESENTED

I. Should the Court resolve inconsistent courts of appeals' decisions establishing conflicting National Environmental Policy Act requirements that must be satisfied before issuance of thousands of federal oil and gas leases each year for tracts of land located across the United States?

II. Should the Court resolve inconsistent courts of appeals' decisions establishing conflicting Endangered Species Act requirements that must be satisfied before issuance of thousands of federal oil and gas leases each year for tracts of land located across the United States?

PARTIES

The parties to this case, as defined by Rule 19.6, are Sun Exploration and Production Company; Conquest Exploration Company; Rocky Mountain Oil and Gas Association; Conoco, Inc.; Champlin Petroleum Company; First Energy Corp.; Marathon Oil Company; Chevron USA, Inc.; Gulf Oil Corp.; Farmers Union Central Exchange, Inc.; Forest Oil Corp.; Britoil Ventures, Inc.; Barrick Exploration Co.; Harry Cullen; Apex Kansas, Inc.; Gem Oil, Inc., Trend Resources Ltd.; Texaco Inc; Texaco Producing Inc.; Duncan Exploration Co.; Union Oil Company of California; Independent Petroleum Association of America; Independent Petroleum Association of Mountain States; Placid Oil Co.; Louisiana Land and Exploration Co.; Anadarko Production Co.; Donald P. Hodel, Secretary of the Interior; Richard E. Lyng, Secretary of Agriculture; Robert Burford, Director, Bureau of Land Management; F. Dale Robertson, Chief, U.S. Forest Service; Marvin LeNoue, Montana State Director, Bureau of Land Management; John W. Mumma, Regional Forester, Region One, U.S. Forest Service; Galen L. Buterbaugh, Regional Director, U.S. Fish and Wildlife

Service; James R. Conner; The Montana Wildlife Federation; and the Madison-Gallatin Alliance. Related parties, as defined by Rule 28.1 for the petitioners, are U.S.X. Corporation and Union Pacific Corporation, parents of Marathon Oil Company and Union Pacific Resources Company, respectively, and Union Pacific Realty Company, Union Pacific Railroad Company, Union Pacific Technologies, Overnite Transportation Company, and U.S. Pollution Control, Inc.

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Sun Exploration and Production Company; Conquest Exploration Company; Marathon Oil Company; Rocky Mountain Oil and Gas Association and Union Pacific Resources Company, formerly Champlin Petroleum Company ("Federal Lessees") respectfully petition the Court for a writ of certiorari to review the Ninth Circuit Court of Appeals' decision in this proceeding.

OPINIONS BELOW

The Ninth Circuit's opinion, reproduced as Appendix A, is reported at 848 F.2d 1441. The opinion of the District Court for the District of Montana, reproduced as Appendix B, is reported at 605 F. Supp. 107.

JURISDICTION

The Ninth Circuit's judgment was entered on January 13, 1988. The Ninth Circuit denied a petition for rehearing on July 27, 1988. Justice O'Connor entered an order on October 18, 1988 granting Federal Lessees an extension of time until November 24, 1988 to file their petition. The Court's jurisdiction to review the Ninth Circuit's judgment rests on 28 U.S.C. § 1254(1) (1982).

PERTINENT STATUTES

This case arises under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (Supp. V 1987) ("MLA"); the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1982) ("NEPA"); and the Endangered Species Act, 16 U. S. C. §§ 1531-1543 (1982) ("ESA"). Pertinent sections of each of those statutes are reproduced as Appendix C.

STATEMENT OF THE CASE

The Secretary of the Interior is authorized to issue federal leases for "[a]ll lands . . . which are known or believed to contain oil or gas deposits . . . ." MLA § 17(a), 30 U.S. C. § 226(a) (Supp. V 1987). The Secretary has exercised his MLA authority with notable frequency since NEPA and ESA were enacted nearly two decades ago. The most recent published statistics reflect that the Secretary had issued 87,568 onshore oil and gas leases that remained outstanding on September 30, 1987, including 7,247 leases during fiscal year 1987. *Public Land Statistics — 1987* (U.S. Dept. of the Interior, March 1988) "*Public Land Statistics*", pp. 58-63. Those leases embrace noncontiguous desert, plains, and mountainous tracts in forty of the fifty states. *Id.* at p. 61.

The federal government has long employed a tiered environmental review process to evaluate oil and gas program proposals to issue leases, to conduct operations on

leases, and to develop and transport to market minerals discovered on leases. Proposals to issue leases are routinely evaluated through preparation of environmental documents[1] and by reference to land management plans covering the lands that may be leased[2] and are approved subject to environmental stipulations that typically prevent any oil and gas activities on certain portions of the leases, limit the conduct of activities elsewhere, and provide that any activity is conditioned upon completion of additional environmental analyses.[3] Proposals to conduct lease exploration operations are routinely evaluated through preparation of additional environmental documents and by reference to land management plans covering lands that may be affected and are approved subject to

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[1] "Environmental documents" are environmental assessments, environmental impact statements, biological assessments and biological opinions prepared by federal agencies to assess the potential effects of a proposal on the environment and/or endangered or threatened species. *See, e.g.*, 40 C.F.R. § 1508.10 (1987).

[2] The leading surface management agencies, the Bureau of Land Management ("BLM") and the U.S. Forest Service ("Forest Service"), are required by law to prepare management plans for all lands under their jurisdictions. *See, e.g.*, Federal Land Policy and Management Act, 43 U.S. C. §§ 1701, 1712 (1982); National Forest Management Act, 16 U.S.C. §§ 1601, 1604 (1982); *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 107 S. Ct. 1419, 1427 (1987). Those land management plans are detailed, multivolume documents prepared by "us[ing] a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences" that specify how a tract of federal land is to be managed. *See* 43 U.S.C. § 1712(c)(2) (1982); 16 U.S.C. § 1604(b) (1982). Land management plans, which are required by law to be circulated to the public in draft form, are accompanied by environmental impact statements. *Id.*

[3] In *Conner*, for instance, environmental stipulations prevented lessees from conducting activities within occupied wildlife habitat; limited all activities seasonally to prevent human activity during "critical periods in animal lifecycles;" and required completion of additional environmental analyses before surface-disturbing activities could be undertaken. *Conner*, 848 F.2d at 1449.

additional stipulations that further restrict lessees' activities to ensure that the environment is protected.[4] Proposals to develop and transport to market minerals discovered on leases are routinely evaluated through preparation of yet additional environmental documents and by reference to land management plans covering the lands that may be affected and are approved subject to additional stipulations that further restrict lessees' activities, again to ensure that the environment is protected.[5] That tiered environmental review process (i) permits preparation of environmental documents that are useful aids to decisionmaking that focus on tangible, concrete proposals before the federal government; (ii) squares with the unfortunate realities of the oil and gas program (a) where only one lease in ten is subject to any exploration activities and only one in ten of leases on which exploration activities have been undertaken are subject to development and (b) where at the time of lease issuance neither the federal government nor lessees know if exploration or development proposals will be made and, if so, how and when those activities will be undertaken; and (iii) is administratively feasible when thousands of oil and gas leases embracing diverse tracts are issued each year and the entire Department of the Interior, not just the BLM's

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[4] A proposal to conduct lease exploration operations is made by filing an Application for Permit to Drill ("APD") with the federal government. *See, e.g.*, 43 C.F.R. §§ 3162.3 and 3162.5-1 (1987). In *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), an APD was approved subject to a host of requirements that were not imposed as lease stipulations, including a requirement that the lessee access the lease by helicopter rather than by pioneering a road into the area.

[5] For instance, the federal government has occasionally found that accessing a lease by truck to service equipment and to transport oil to market may adversely affect species during certain seasons critical to their lifecycles. Under those circumstances the federal government has required a lessee to transport oil by pipeline and to equip the lease with remote sensory devices so that access is limited during critical animal lifecycles.

oil and gas leasing branch, prepares less than 100 draft *and* final environmental impact statements annually.[6]

That tiered environmental review process was employed here. Federal Lessees applied to the Department of the Interior for issuance of noncompetitive oil and gas leases over a nine-year period from 1973 to 1981.[7] Because the leasing proposals covered tracts within National Forests, the Department of the Interior promptly notified the Department of Agriculture of the offers and requested its recommendations on whether leases should issue and, if so, what stipulations should be imposed to protect the environment. The federal government, however, did not promptly evaluate and respond to the leasing proposals as it does in the normal course; instead, after hundreds of oil and gas lease offers had been filed the federal government began preparation of environmental documents that analyzed the offers by grouping them according to the two National Forests within which lands sought were located, the Flathead and Gallatin. The federal government prepared two environmental assessments, collectively exceeding 225 pages, that discussed pertinent environmental constituents, identified four alternatives, including the "no-action" alternative, and evaluated the effects of each of those alternatives on environmental constituents; prepared two biological assessments discussing the potential effects of the proposals on endangered or

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[6] *See, e.g., Park County Resource Council v. United States Department of Agriculture*, 817 F.2d at 623-624; Petition, pp. 9-11, *infra*.

[7] For many years, the MLA authorized the Secretary of the Interior to issue oil and gas leases noncompetitively if a tract did not embrace a Known Geologic Structure. *See* 30 U.S.C. § 226(b)(1982). On December 22, 1987 Congress amended the MLA to, among other things, require that the Secretary attempt to issue all leases competitively and to issue leases noncompetitively if satisfactory competitive offers were not received. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub.L.100-203, 101 Stat. 1330-256.

threatened species and their critical habitats; and prepared two biological opinions evaluating whether the proposals would jeopardize those species or their critical habitats. Based on that evaluation the federal government rejected certain lease offers and accepted others subject to stipulations to ensure that the environment is protected.

Plaintiffs challenged the federal government's decisions to issue those leases in an action brought in the District Court for the District of Montana pursuant to 28 U.S.C. § 1331 (1982). Plaintiffs contended that the federal government had violated NEPA and ESA requirements because it had not prepared comprehensive environmental impact statements and biological opinions — documents addressing not only the leasing proposals, before the federal government, but also potential exploration and development activities that might never be proposed — prior to issuance of the leases. The District Court agreed. *Conner v. Burford*, 605 F. Supp. 107 (D. Mont. 1985). Federal Lessees, who were not notified of the action challenging their leases until after the District Court rendered its decision, immediately moved the District Court for leave to intervene and to reconsider its decision. The District Court refused to reconsider its decision and allowed Federal Lessees to intervene for appeal purposes only. The Ninth Circuit Court of Appeals generally affirmed the District Court's decision, holding that the federal government must prepare comprehensive environmental impact statements and biological opinions before a typical oil and gas lease may issue. *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988).

REASONS FOR GRANTING CERTIORARI

I. COURTS OF APPEALS HAVE RENDERED INCONSISTENT DECISIONS ESTABLISHING CONFLICTING NEPA REQUIREMENTS FOR THE FEDERAL OIL AND GAS PROGRAM.

Challenges to the longstanding environmental review procedures employed for the federal oil and gas program have arisen in three circuits. *See Park County Resource Council v. United States Department of Agriculture*, reproduced as Appendix D and reported at 817 F.2d 609 (10th Cir. 1987) ("*Park County*")[8]; *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) ("*Conner*"); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) ("*Sierra Club*"). Challengers have contended that the historical practice of preparing environmental documents on oil and gas proposals actually before the federal government does not satisfy NEPA requirements; they contend that NEPA requires that comprehensive environmental impact statements — environmental impact statements addressing not only leasing proposals, but also potential exploration and development scenarios — must be prepared before federal oil and gas leases may issue. *See Park County*, 817 F.2d at 622; *Conner*, 848 F.2d at 1446; *Sierra Club*, 717 F.2d at 1410. The courts of appeals have rendered conflicting decisions that have established different legal requirements for federal lands across the United States.

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[8] In *Park County* plaintiffs sought to stay the District Court's decision affirming the federal government's longstanding environmental review procedures. That request was denied not only by the District Court and the Tenth Circuit, but also by Circuit Justice Byron R. White in an order entered on July 14, 1985 and by Chief Justice Warren E. Burger in an order entered on October 7, 1985. *Park County*, 474 U.S. 807, 106 S. Ct 42 (1985).

A. The Tenth Circuit Court of Appeals Has Affirmed the Federal Government's Longstanding NEPA Environmental Review Procedures.

The Tenth Circuit Court of Appeals, affirming *Park County Resource Council v. United States Department of Agriculture*, 613 F. Supp 1182 (D. Wyo. 1985) (Brimmer, C.J.), upheld historical oil and gas environmental review procedures in *Park County*. The Tenth Circuit's decision, which it described as based on "a well-developed body of case law under NEPA, as well as considerations of public policy . . . ," rested on a four-part analysis. *Park County*, 817 F.2d at 620.

First, the Tenth Circuit began its analysis with pertinent statutory language; NEPA requires preparation of an environmental impact statement for "every recommendation or report on *proposals* for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1982), cited in *Park County*, 817 F.2d at 612 (emphasis added). The Tenth Circuit concluded that that statutory language requires preparation of environmental impact statements only when *proposals* are made, expressly recognizing that this Court had held that "an EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*," *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146, 102 S. Ct. 197, 203 (1981) (emphasis in original), and that an environmental impact statement is not required "during the *germination process of a potential proposal*," *Kleppe v. Sierra Club*, 427 U.S. 390, 406, 96 S. Ct. 2718, 2728 (1976) (emphasis added). *Park County*, 817 F.2d at 622, 623. *See also Kleppe v. Sierra Club*, 427 U.S. at 401 n.12, 403, 406, 410 n.20, 96 S. Ct. at 2726 n.12, 2727, 2728, 2730 n.20. The Tenth Circuit found that the federal government viewed the oil and gas lease offers before it, not subsequent exploration or development scenarios that may or may not ever be proposed,

as the *proposal* on which environmental review must be conducted and concluded that deference to that determination must be accorded by the courts. *Park County*, 817 F.2d at 621. *See also Kleppe v. Sierra Club*, 427 U.S. at 412-414, 96 S. Ct. at 2731-2732.

Second, the Tenth Circuit recognized that deference to the federal government's determination as to the *proposal* before it was not absolute. The Tenth Circuit acknowledged that "segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action has been held to be unlawful." *Park County*, 817 F.2d at 622 (citations omitted). The Tenth Circuit concluded that NEPA requires preparation of a comprehensive environmental impact statement for activities "so interdependent that it would be *unwise or irrational* to complete one without the other," *Park County*, 817 F.2d at 623 (citations omitted) (emphasis added).

Third, the Tenth Circuit concluded for three reasons that it was not *unwise or irrational* for the federal government to prepare tiered environmental review documents for leasing, exploration, and development proposals instead of preparing comprehensive environmental impact statements prior to lease issuance addressing all such activities whether or not ever proposed. First, the Tenth Circuit found that the probabilities that development proposals would be forthcoming were remote. The Tenth Circuit concluded that for "the paradigmatic oil and gas lease" post-leasing development proposals were "an extremely tentative possibility at best . . . [b]ecause exploration activities are conducted on only about one of ten federal leases issued and development activities are conducted on only about one of ten of those leases upon which exploration activities have been approved and completed." *Park County*, 817 F.2d at 623. Second, the Tenth Circuit, relying on this Court's holding that a concrete proposal providing a "factual predicate" is required

before an environmental impact statement can be prepared, *Kleppe v. Sierra Club*, 427 U.S. at 402, 96 S. Ct at 2726, found that such specificity exists under the federal government's longstanding environmental review process and fails to exist under the approach championed by leasing opponents. *Park County*, 817 F.2d at 624 (citations omitted). The Tenth Circuit concluded that the federal government's longstanding environmental review process "is calculated to provide the most informed decision-making possible" by requiring preparation of environmental documents when "concrete, site-specific proposals [are] before it and a more useful environmental appraisal can be undertaken." *Park County*, 817 F.2d at 624 (citations omitted). The Tenth Circuit concluded that "[w]hen BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area," that under plaintiffs' approach "the specificity that NEPA requires is simply not possible", and that the exercise of preparing comprehensive environmental impact statements "would at best amount to speculation as to future events and obviously would not be of much use as input in deciding whether to proceed." *Park County*, 817 F.2d at 624 (citations omitted). Third, the Tenth Circuit found that the preparation of comprehensive environmental impact statements prior to lease issuance would not improve decision-making, would be burdensome, and would not be administratively feasible. *Park County*, 817 F.2d at 623-624. The Tenth Circuit concluded that if comprehensive environmental impact statements were required, they would be "boilerplate" and would "trivialize" the NEPA process; their preparation would result in substantial expenditures of tax dollars, manpower and time

involved;[9] and, as a practical matter, the size of the federal oil and gas program where well over seven thousand leases are issued annually across the United States so dwarfed the number of environmental impact statements the entire Department of Interior prepares annually that the federal oil and gas program would be substantially curtailed without measurably improving the decisionmaking process.[10] *Park County*, 817 F.2d at 623.

Fourth, the Tenth Circuit concluded that the federal government's longstanding environmental review process was "within the bounds of reasoned decisionmaking," *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105, 103 S. Ct. 2246, 2256 (1983), and constituted the required "hard look" at the environmental consequences of oil and gas leasing, *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 21, 96 S. Ct. at 2730 n.21. *Park County*, 817 F.2d at 622. The Tenth Circuit held that, in light of "the lease stipulations imposed . . . to avoid untoward environmental consequences" and the fact that subsequent exploration and development proposals are "subject to continuing NEPA review," leasing opponents had not "shoulder[ed] the[ir] burden" of establishing "that the federal government's decision to issue leases without preparing comprehensive environmental impact statements was an unreasonable one." *Park County*, 817 F.2d at 621-622. Consequently, it rejected the challenge

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[9] In *River Road Alliance v. Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985), Judge Posner rejected a NEPA challenge to a federal agency action, concluding that "the time and expense of preparing an environmental impact statement [would not be] commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides."

[10] The entire Department of the Interior, comprised of the BLM and a handful of other agencies, prepared less than 100 draft *and* final environmental impact statements for all of its programs during 1986, the last year for which published statistics are available. *See* Council on Environmental Quality, Seventeenth Annual Report, p. 246.

brought by leasing opponents and upheld the federal government's longstanding NEPA procedures for the federal oil and gas program.[11]

B. The Ninth Circuit Court of Appeals Has Struck Down the Federal Government's Longstanding NEPA Environmental Review Procedures.

The Ninth Circuit Court of Appeals struck down the federal government's NEPA procedures in *Conner*. The Ninth Circuit's decision, which did not discuss *Park County* even though a copy of that decision was forwarded to the Court months before the *Conner* decision was rendered, rested on a three-part analysis.

First, citing pertinent NEPA statutory language *except* that which limits the requirement to prepare environmental impact statements to *proposals*, the Ninth Circuit embarked on an effort to fashion a rule when environmental impact statements should be prepared, notwithstanding this Court's holding in *Kleppe v. Sierra Club*, 427 U.S. at 406, 96 S. Ct. at 2728, that "[t]he procedural duty imposed upon agencies by this section [that requiring preparation of environmental impact statements when *proposals* are made] is quite precise," that "the role of courts in enforcing that duty is similarly precise," and that

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[11] MLA § 42, 30 U.S.C. § 226-2 (Supp. V 1987), provides that "[n]o action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter." Federal Lessees submit that that provision bars any party from challenging a Department of the Interior oil and gas program decision, including a challenge grounded on NEPA, unless the action is commenced within ninety days after the decision. The Tenth Circuit rejected that contention and the District Court's holding on that issue in *Park County*, 817 F.2d at 616. If the Tenth Circuit's interpretation were to prevail, NEPA challenges to federal oil and gas program decisions may be commenced years after leases issue in a manner inconsistent with both the plain language of and congressional intent supporting 30 U.S.C. § 226-2.

"[a] Court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point . . . at which an [environmental] impact statement *should be prepared*" (emphasis in original). *Conner*, 848 F.2d at 1446. Instead of examining the proposal for leasing that was before the federal government and paying deference to its decision as required by this Court in *Kleppe v. Sierra Club*, 427 U.S. at 406, 96 S. Ct at 2728, the Ninth Circuit concluded that environmental impact statements must be prepared at the "point of commitment" when decision-makers "retain a maximum range of options." *Conner*, 848 F.2d at 1446.[12]

Second, the Ninth Circuit recognized that only a small minority of leases issued are subject to exploration activities and only a small minority of those leases are subject to development activities, *Conner*, 848 F.2d at 1450 n.21; that the federal government undertakes additional environmental analyses if and when subsequent exploration or development proposals are made, *Conner*, 848 F.2d at 1446, 1449; and that the Secretary routinely imposes stipulations at the time of lease issuance "restricting (1) timing of surface occupancy (to prevent human activity during critical periods in animal lifecycles), (2) frequency of road use (to minimize human/animal contact), or (3) location of surface activity (to avoid activity near recreation areas, steep slopes, unstable soils, or occupied wildlife habitat)," *Conner*, 848 F.2d at 1449. Nonetheless, based on its legal conclusion that federal agencies could

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[12] In *Kleppe v. Sierra Club*, 427 U.S. at 406, 96 S. Ct. at 2728, the Court concluded that imposition of a judicially-devised test for preparing environmental impact statements "would leave agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, . . . would invite litigation, . . . and would result in the preparation of a good many unnecessary impact statements." The Ninth Circuit failed to consider any of those factors in rendering its decision in *Conner*.

not "absolutely . . . prevent all surface disturbing activity" and its finding of fact that such activities are "highly intrusive," *Conner*, 848 F.2d at 1449, 1450, the Ninth Circuit concluded that comprehensive environmental impact statements addressing not only leasing proposals, but also exploration and development scenarios, are required before lease issuance because that is the "point of commitment" where the federal government "retains a maximum range of options" and "substantial questions remain as to whether the measures will completely preclude significant environmental effects."[13] *Conner*, 848 F.2d at 1446, 1450.

Third, the Ninth Circuit recognized that at the time an oil and gas lease issues, neither the federal government nor lessees know if exploration or development will occur and, if so, what form it will take. *Conner*, 848 F.2d at 1450. Rejecting the guidance of this Court that environmental impact statements can be prepared only if concrete proposals provide the necessary "factual predicate," *Kleppe v. Sierra Club*, 427 U.S. at 402, 96 S. Ct. at 2726, the Ninth Circuit concluded that an environmental impact statement could be prepared by "estimating what those effects might be . . . ." *Conner*, 848 F.2d at 1450.

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[13] Although NEPA requires federal agencies to prepare environmental impact statements on *proposals* for major federal actions *significantly affecting the quality of the human environment* 42 U.S.C. § 4332(C)(1982), and the Administrative Procedure Act ("APA") 5 U.S.C. § 706 (1982), provides that an agency decision is to be upheld unless demonstrated to be "arbitrary, capricious [or] an abuse of discretion," the Ninth Circuit has concluded in a series of cases that environmental impact statements must be prepared if the opponent of governmental action alleges "substantial questions" whether the proposal will "significantly degrade the human environment." *See, e.g., Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986). Federal Lessees respectfully submit that the "substantial question" standard is inconsistent with NEPA and APA and that its invocation results in unwarranted preparation of environmental impact statements.

C. The District of Columbia Court of Appeals Has Rendered Conflicting Decisions On the Federal Government's Longstanding NEPA Environmental Review Procedures.

The federal government's environmental review procedures for the oil and gas program have also been challenged in the District of Columbia. In *Sierra Club*, plaintiffs challenged issuance of oil and gas leases for lands in a "Further Planning Area" — an area for which studies are ongoing to determine whether it should be designated wilderness — on the grounds that the federal government had not prepared an environmental impact statement.[14] The District Court rejected that challenge because (i) "the majority of federal non-competitive oil and gas leases never reach the drilling state," (ii) the "potential impacts of exploration are wholly dependent upon the scope of operations proposed for a specific site," (iii) the "decision to delay preparation of appropriate environmental impact statements until site-specific development proposals are submitted is neither arbitrary nor capricious," (iv) "the stipulations included in the leases . . . will effectively ensure that the environment will not be significantly affected until further analysis pursuant to NEPA," and (v) "the Court is convinced that the federal defendants took a 'hard look' at the proposals presented them and reached a rational conclusion." *Sierra Club v. Peterson*, No. 81-1230 (D.D.C., March 31, 1982), 12 ELR 20454, 20457 (1982). The Court of Appeals reversed on the facts of the case before it, employing an analysis

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[14] "Further Planning Areas," like "Wilderness Study Areas," are lands being evaluated by the appropriate surface management agency and the President for possible recommendation to Congress for designation as wilderness. *See, e.g.*, 43 U.S.C. § 1782 (1982). Because actions taken in wilderness study areas may affect their ultimate designation as wilderness, proposed actions affecting those lands are even more strictly restricted than those affecting designated wilderness areas. *Id.*

substantially similar to that relied upon by the Ninth Circuit in *Conner. Sierra Club*, 717 F.2d at 1413-1415.

The Court of Appeals did not attempt to reconcile its decision in *Sierra Club* with its decision in *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) ("*Cabinet Mountains*"), rendered one year earlier. There a mineral developer sought to drill approximately 150 holes over a four-year period in the Cabinet Mountains Wilderness Area in Montana. The federal government approved that proposal after preparing an environmental assessment, not an environmental impact statement, addressing the proposal before it, not future exploration or development proposals that might or might not be forthcoming. Plaintiffs challenged that course of action. Both the District Court, *Cabinet Mountains Wilderness v. Peterson*, 510 F. Supp. 1186, 1189 (D.D.C. 1981), and the Court of Appeals, *Cabinet Mountains*, 685 F.2d at 683, rejected that challenge on the grounds that the federal government's actions were not "arbitrary, capricious, or an abuse of discretion."[15] The analysis of both the Court of Appeals and the District

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[15] The *Park County*, *Conner*, and *Cabinet Mountains* decisions reflect a notable split in the circuits as to the appropriate standard of review in evaluating whether an agency's determination to forego preparation of an environmental impact statement should be overturned. The Third, Fifth, Eighth, Ninth and Tenth Circuits will overturn an agency decision not to prepare an environmental impact statement when they conclude that the decision is "unreasonable." *See, e.g., Conner*, 848 F.2d at 1446. The District of Columbia, First, Second, Fourth, and Seventh Circuits will overturn an agency decision not to prepare an environmental impact statement when they conclude that the decision is "arbitrary, capricious, or an abuse of discretion." *See, e.g., Cabinet Mountains*, 685 F.2d at 681. Several justices, recognizing that "[t]he lower courts have long been in disarray on what standard of review to apply to an agency's decision not to undertake an EIS [environmental impact statement]," have concluded that the Court should "end this confusion" as to the appropriate legal standards. *See, e.g., Gee v. Boyd*, 471 U.S. 1058, 1060, 105 S. Ct. 2123, 2126 (1985) (White, Brennan and Marshall, JJ, dissenting from denial of certiorari).

Court rested on their view that the *proposal* before the federal government triggers when environmental documents must be prepared and that "[a]ny future *proposals* . . . will require further scrutiny under NEPA . . . ." *Cabinet Mountains*, 685 F.2d at 687 (emphasis added); *Cabinet Mountains Wilderness v. Peterson*, 510 F. Supp. at 1190. The Court of Appeals manifestly did not find conclusive the fact that under the General Mining Law of 1872, the statutory authority under which the proposal was evaluated, the federal government could not "absolutely prevent" exploration or development activities after discovery of a valuable mineral deposit. *See, e.g.*, 30 U.S.C. §§ 22, 23 (1982).

D. The Court Should Exercise Its Supervisory Authority by Rendering A Dispositive Decision Resolving the Inconsistencies In Courts of Appeals' Decisions.

Courts of appeals in the three circuits where decisions to issue oil and gas leases will most often be challenged have rendered inconsistent decisions as to what environmental review procedures must be employed for the federal oil and gas program. The Tenth Circuit has approved the federal government's environmental review procedures. The Ninth Circuit has struck them down. The District of Columbia Circuit has struck those procedures down on the limited facts of one case, but has affirmed them in a parallel case. Federal Lessees respectfully submit that the Court should exercise its supervisory authority by rendering a dispositive decision resolving these inconsistencies in courts of appeals' decisions.

II. COURTS OF APPEALS HAVE RENDERED INCONSISTENT DECISIONS ESTABLISHING CONFLICTING ESA REQUIREMENTS FOR THE FEDERAL OIL AND GAS PROGRAM.

Just as they have contended that NEPA requires the federal government to prepare comprehensive environmental impact statements addressing leasing proposals and exploration and development scenarios before oil and gas leases may issue, leasing opponents have also contended that ESA requires preparation of comprehensive biological opinions addressing not only leasing proposals, but also exploration and development scenarios before leases may issue. Just as they had done with respect to the NEPA challenges, courts of appeals in three circuits have rendered inconsistent decisions on the ESA challenges. The Tenth and the District of Columbia Circuits have rendered decisions affirming the federal government's traditional ESA review process. *Park County*, 817 F.2d at 612; *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980) ("*Andrus*"); *Cabinet Mountains*, 685 F.2d at 679. The Ninth Circuit has rendered conflicting decisions, the latest of which struck down the federal government's longstanding ESA procedures. *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984) ("*False Pass*"); *Conner*, 848 F.2d at 1443.

A. The Tenth Circuit Court Of Appeals Has Affirmed The Federal Government's Longstanding ESA Review Procedures.

In *Park County* the Forest Service prepared a biological assessment on the oil and gas leasing proposal before it and concluded that the proposal could affect endangered or threatened species or their critical habitat. 16 U.S.C. § 1536(c) (1982). The Forest Service, consequently, initiated formal consultation with the pertinent wildlife agency, the U.S. Fish and Wildlife Service. 16 U.S.C. § 1536(b) (1982). The U.S. Fish and Wildlife Service rendered a biological opinion concluding (i) that the proposal

before the federal government would not jeopardize the continued existence of an endangered or threatened species or its critical habitat if certain mitigation requirements were imposed and (ii) that, consistent with its longstanding practice, additional ESA consultations and further biological opinions would be required if subsequent exploration or development proposals were forthcoming. *Park County* Record on Appeal, Vol. VI, Exhibit 21, p. 144. Those decisions were challenged on the grounds that ESA requires the federal government to prepare comprehensive biological opinions addressing possible exploration and development scenarios prior to approving the proposal before it. Opening Brief of Park County Resource Council in *Park County*, p. 38; *Park County*, 817 F.2d at 612, 613; *Park County Resource Council v. Department of Agriculture*, 613 F. Supp. at 1188. Both the Court of Appeals and the District Court rejected that challenge on grounds that parallel their NEPA holdings. *Id.*; Petition, pp. 8-12, *supra*.

B. The District Of Columbia Court Of Appeals Has Affirmed The Federal Government's Longstanding ESA Review Procedures.

In *Cabinet Mountains* the District of Columbia Court of Appeals, as had the District Court, affirmed the federal government's longstanding ESA review procedures. The District of Columbia Circuit's decision rested on a three-part analysis.

First, the Court of Appeals began its analysis with pertinent ESA statutory language; ESA requires that "[e]ach federal agency shall . . . insure that any *action* authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species . . . ." 16 U.S.C. § 1536(a)(2) (1982), cited in *Cabinet Mountains*, 685 F.2d at 681 (emphasis added). The Court of Appeals found that the federal government viewed the mineral exploration proposal, not subsequent exploration or development proposals that

might or might not be forthcoming, as the action before it and had prepared its biological opinion accordingly. *Cabinet Mountains*, 685 F.2d at 680. The Court of Appeals suggested, by incorporating its analysis of the NEPA challenge, that those actions were entitled to deference by the courts. *Cabinet Mountains*, 685 F.2d at 684.

Second, the District of Columbia Circuit expressly rejected the contention that ESA decisions are subject to *de novo* review by the courts. *Cabinet Mountains*, 685 F.2d at 684. The Court of Appeals held that the federal government's ESA decisions on the scope and content of biological opinions would be affirmed unless found to be "arbitrary, capricious, or an abuse of discretion." *Cabinet Mountains*, 685 F.2d at 685-687.

Third, The District of Columbia Circuit held that the federal government's ESA review process and the agency decision that the action proposed would not jeopardize endangered or threatened species satisfied the arbitrary and capricious standard. *Cabinet Mountains*, 685 F.2d at 687. The Court of Appeals found (i) that the federal government had reserved the right to require further ESA consultations and to prepare additional biological opinions if subsequent exploration or development proposals were forthcoming, and (ii) that the federal government had approved the proposal before it subject to a series of mitigation requirements which ensured that the proposal would not jeopardize endangered or threatened species. *Cabinet Mountains*, 685 F.2d at 686. Consequently, the Court of Appeals concluded that the federal government had satisfied ESA requirements.

The District of Columbia Circuit's *Cabinet Mountains* decision is consistent with its *Andrus* decision rendered two years earlier. There the pertinent ESA consultation agency, the National Marine Fisheries Service, prepared a biological opinion on a leasing proposal made pursuant to the Outercontinental Shelf Lands Act ("OCSLA"), 43

U.S.C. § 1331 (1982), and concluded that the issuance of offshore oil and gas leases would not jeopardize the existence of an endangered whale species and that further ESA consultations and biological opinions would be required if exploration or development proposals were forthcoming. *Andrus*, 642 F.2d at 608. The District Court held that the federal government failed to satisfy ESA requirements because it did not prepare a comprehensive biological opinion addressing both the leasing proposal before it and potential exploration or development proposals that might or might not be forthcoming. *North Slope Borough v. Andrus*, 486 F. Supp. 332 (D.D.C. 1980). The District of Columbia Court of Appeals reversed the District Court's decision, expressly rejecting the District Court's view that there is any inconsistency between ESA requirements that a comprehensive biological opinion be prepared and OCSLA requirements that biological opinions be limited to the proposal before the federal government. *Andrus*, 642 F.2d at 608. The Court of Appeals held that ESA grants the federal government specific authority to prevent further exploration or development activities if those activities would jeopardize the continued existence of endangered or threatened species. *Andrus*, 642 F.2d at 608, citing *Conservation Law Foundation of New England v. Andrus*, 623 F.2d 712 (1st Cir. 1979). The Court of Appeals found that the stipulations imposed by the federal government in the biological opinion ensured that jeopardy would not occur, *Andrus*, 642 F.2d at 595, and upheld the federal government's decision to prepare a biological opinion solely on the leasing proposal because of "checks and balances and all mitigating measures adopted," *Andrus*, 642 F.2d at 609. In reaching its decision, the District of Columbia Court of Appeals concluded that "by insuring graduated compliance with environmental and endangered life standards, OCSLA makes ESA requirements more likely to be satisfied both in an ultimate and a proximate sense." *Andrus*, 642 F.2d at 609.

C. The Ninth Circuit Court Of Appeals Has Rendered Conflicting Decisions On The Federal Government's Longstanding ESA Review Procedures.

The Ninth Circuit Court of Appeals struck down the federal government's longstanding ESA review process in *Conner*. *Conner* rested on a three-part analysis.

First, the Ninth Circuit recognized that ESA requires federal agencies to prepare biological assessments and biological opinions only for "actions." *Conner*, 848 F.2d at 1453. The Ninth Circuit acknowledged that the federal government viewed the *action* before it, the leasing proposal, as the *action* on which biological opinions must be prepared, and that the federal government had proceeded accordingly. *Conner*, 848 F.2d at 1452.

Second, the Ninth Circuit recognized that its authority to reverse the federal government's decision was narrow. The Ninth Circuit held that "we will not reverse the FWS' [U.S. Fish and Wildlife Service] decision to limit the biological opinion to the lease stage unless that decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Conner*, 848 F.2d at 1453.

Third, the Ninth Court held, over a vigorous dissent, that the federal government's decision to limit the biological opinion to the lease proposal before it did not satisfy the arbitrary and capricious standard. The Ninth Circuit acknowledged that ESA requires the federal government to reject proposals that may jeopardize endangered or threatened species at any time after lease issuance. *Conner*, 848 F.2d at 1456. The Ninth Circuit acknowledged that the federal government had imposed lease stipulations reserving it unbridled discretion to prevent any post-leasing exploration or development activities that would jeopardize endangered or threatened species. *Conner*, 848 F.2d at 1455. The Ninth Circuit held, however, that to affirm the federal government's longstanding ESA review process (i) would be inconsistent with "Section 7 of the

ESA [which] on its face requires the FWS [U.S. Fish and Wildlife Service] in this case to consider . . . post-leasing activities in its biological opinion," *Conner*, 848 F.2d at 1453; (ii) would be "to carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion — in this case one addressing the effects of leasing and all postleasing activities" be prepared, *Conner*, 848 F.2d at 1455; and (iii) would be unwarranted because, unlike the case of OCSLA and ESA, "there is no tension between the MLA and the ESA" and "no system of checks and balances," *Conner*, 848 F.2d at 1456-57. The *Conner* decision rests heavily on *Andrus* notwithstanding that the District of Columbia Circuit reached the opposite conclusion where the federal government retained precisely the same rights to protect endangered or threatened species. *Conner*, 848 F.2d at 1456.

The Ninth Circuit's *Conner* decision conflicts with its *False Pass* decision rendered several years earlier. There the federal government had prepared a biological opinion limited solely to the lease proposal before it and issued an OCSLA lease based on that analysis. *False Pass*, 733 F.2d at 607; *Conner*, 848 F.2d at 1462. That action was challenged. *False Pass*, 733 F.2d at 607. The Ninth Circuit, as had the District Court, affirmed the federal government's actions. The "determinative factor in *False Pass*," as its author has written, "was that the proposed plan of resource exploitation was segmented in such a way as to require agency approval prior to the commencement of each new stage of development." *Conner*, 848 F.2d at 1463. Under those circumstances, the Ninth Circuit found that the federal government's actions satisfied ESA requirements. *False Pass*, 733 F.2d at 612.

D. The Court Should Exercise Its Supervisory Authority and Render A Dispositive Decision Resolving The Inconsistencies In Courts of Appeals' Decisions.

Courts of appeals in the three circuits where decisions to issue oil and gas leases will most often be challenged have rendered inconsistent decisions as to what ESA procedures must be employed for the federal oil and gas program. The Tenth and the District of Columbia Circuits have approved the federal government's ESA review process. The Ninth Circuit has upheld it in some circumstances and struck it down in others. Federal Lessees respectfully submit that the Court should exercise its supervisory authority and render a dispositive decision resolving this inconsistency in courts of appeals' decisions.

III. THE CONFLICTING NEPA AND ESA COURTS OF APPEALS DECISIONS HAVE THROWN THE CRITICAL OIL AND GAS PROGRAM INTO DISARRAY.

The federal onshore oil and gas program is a substantial one. Nearly ninety thousand federal onshore oil and gas leases were outstanding on September 30, 1987. *Public Land Statistics*, pp. 58-63. Over one thousand APDs were approved in fiscal year 1987 authorizing activities on those leases. *Public Land Statistics*, p. 55. The projected market value of oil and gas produced from those leases exceeded $4,100,000,000 in fiscal year 1986, the last year for which published statistics are available. *Mineral Revenues: 1986 Report on Receipts From Federal and Indian Leases* (U.S. Dept. of the Interior, 1987) ("*Mineral Revenues*"), pp. 53-54.

The federal onshore oil and gas program is a substantial contributor to the nation's supply of oil and gas. Over 157,000,000 barrels of oil and approximately

1,129,000,000 million cubic feet of gas and related products were produced from federal onshore leases during fiscal year 1986. *Mineral Revenues*, pp. 53-54. That production satisfies a major portion of the approximately 55 percent of the nation's oil and gas requirements derived from domestic sources. *American Petroleum Institute's Energy Backgrounder* (November 1988).

The onshore oil and gas program is also a substantial contributor to local, state, and federal government revenues. Approximately eighty percent of the taxable value of all real and personal property in Hot Springs, Park, Sublette, and Uintah Counties, Wyoming, for instance, is derived from oil and gas sources, with the lion's share attributable to federal oil and gas leases because the federal government owns over 75 percent of the mineral estates in those counties. *State of Wyoming 1986 Annual Report, Department of Revenue and Taxation, Ad Vaolorem Tax Division* (1987), p. 201. Nearly $425,000,000 in federal onshore oil and gas program receipts were distributed directly to the states in fiscal year 1986, *Mineral Revenues*, p. 6, and those proceeds and state taxes paid on federal oil and gas activities in Wyoming alone that year approximated $365,000,000, *Wyoming Oil and Gas Facts and Figures* (Petroleum Association of Wyoming, 1988). The federal onshore program is one of the largest sources of federal revenues other than federal income taxes, with contributions exceeding $775,000,000 in fiscal year 1986. *Mineral Revenues*, p. 6.

The federal onshore oil and gas program is also the lifeblood of the oil and gas industry and its employees. The tens of thousands of federal onshore leases that are outstanding are held by majors, independents, and individuals represented by Federal Lessees. Federal onshore leases constitute a substantial portion of those companies' lease portfolios because well over one-half of all lands in the

Western United States are owned by the federal government. *Public Land Statistics*, p. 5. Company activities undertaken in support of those leases are correspondingly substantial, particularly in light of the fact that more attention generally must be paid to federal than private leases.

The Ninth Circuit's decision holding that historical environmental review practices do not satisfy NEPA and ESA requirements has thrown the critical federal onshore program into disarray. Federal agencies charged with issuing onshore oil and gas leases are unsure how they should proceed. As a consequence, fewer federal oil and gas leases have been issued and efforts to issue leases have been protested on grounds that the federal government has not prepared the comprehensive environmental documents apparently required by *Conner*.[16] The reduction in federal onshore leases will decrease domestic energy production at a time when domestic consumption of foreign produced oil and gas is reaching pre-Arab Oil Embargo levels. The reduction in federal onshore leases will adversely affect local, state, and federal government revenues at a time when they are already faced with large budget deficits. And the reduction in federal oil and gas leases will substantially injure those in the oil and gas industry who rely on federal oil and gas leases to support their activities.

Federal Lessees submit that these broad-ranging consequences are unwarranted because the *Conner* decision is wrong. Intervention by this Court is required to right that wrong in the public interest.

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16. *See, e.g.*, September 7, 1988 letter from Sierra Club, Sierra Club Legal Defense Fund, Inc., and Colorado Environmental Coalition protesting the issuance of onshore leases in Colorado; September 16, 1988 letter from National Wildlife Federation and Montana Wildlife Federation protesting the issuance of onshore leases in Montana.

IV. THE NINTH CIRCUIT DECISION IS INCONSISTENT WITH UNAMBIGUOUS CONGRESSIONAL INTENT.

NEPA and ESA were enacted at the outset of the 1970s. The Department of the Interior contemporaneously interpreted those statutes as authorizing it to propose tiered environmental documents on federal oil and gas leasing, exploration and development proposals that came before it. It has adhered to that construction for nearly two decades and has issued tens of thousands of onshore leases in reliance on it.

Congress is intimately familiar with the longstanding environmental review process employed by the federal government for its onshore oil and gas program. Congress failed for nearly two decades to reverse or to modify that process, notwithstanding that it could have done so at any time, including when it was appropriating monies annually for the onshore oil and gas program in general and for preparation of environmental documents in particular. Federal Lessees respectfully submit that that studied inaction manifests congressional acquiescence in the federal government's NEPA and ESA review procedures for the oil and gas program. *See, e.g., CBS v. Federal Communications Com'n*, 453 U.S. 367, 382, 101 S. Ct. 2813, 2823, (1981); *Costanzo v. Tillinghast*, 287 U.S. 341, 345, 53 S. Ct. 152, 153 (1982); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473, 35 S. Ct. 309, 312-313 (1915).

Moreover, in 1987 Congress amended the MLA oil and gas provisions. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. 100-203, 101 Stat. 1330-256. A bill introduced in early 1987 and ultimately approved by the House of Representatives contained statutory provisions that would have required comprehensive consideration of leasing proposals, exploration and development scenarios prior to issuance of onshore oil and gas leases. H. Rept. 100-378, 100 Cong., 1st Sess. 9, 13, 14, 31, 32 (1987). The Senate bill contained no such provision. S. Rept. 100-

188, 100 Cong., 1st Sess. 1 (1987). Conferees rejected the House's comprehensive environmental review requirements, both chambers agreed with the conferees' approach, and the President signed the amendments into law on December 22, 1987. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. 100-203 101 Stat. 1330-256. Federal lessees respectfully submit that Congress' failure less than one year ago to reverse these longstanding NEPA and ESA review procedures for federal oil and gas leasing when the precise question was before it reflects congressional acceptance of those provisions. *See, e.g., Zomel v. Rusk*, 381 U.S. 1, 11-12, 85 S. Ct. 1271, 1278 (1965); *United States v. Pfitsch*, 256 U.S. 547, 551-552, 41 S. Ct. 569, 570 (1921).

Federal Lessees submit that this congressional response reflects that the federal government's longstanding environmental review procedures for its federal oil and gas program are lawful. The Ninth Circuit's *Conner* decision is inconsistent with congressional intent as so manifested.

CONCLUSION

Courts of Appeals have rendered disparate decisions on whether the federal government's longstanding environmental review procedures for the federal oil and gas program satisfy NEPA and ESA requirements. The *Conner* decision has thrown the critical oil and gas program into disarray and has adversely affected local, state, and federal governments, the oil and gas industry, and the nation as a whole. The *Conner* decision is inconsistent with congressional intent as reflected not only by its acquiescence in the federal government's longstanding environmental review program, but also its express rejection of a planning requirement similar to that required by *Conner* less

than a year ago. Under those circumstances, Federal Lessees respectfully submit that this Court should issue a writ of certiorari to the Ninth Circuit.

Respectfully submitted,

Charles L. Kaiser
(Counsel of Record)
Mary A. Viviano
Suite 4700
370 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

Counsel for Petitioners

November, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 85-3929 to 85-3937.

JAMES R. CONNER, et al.,
Plaintiffs-Appellees,

v.

ROBERT BURFORD, DIRECTOR, BUREAU OF LAND MANAGEMENT, et al.,
Defendants-Appellants,

and

PLACID OIL COMPANY, CONQUEST EXPLORATION COMPANY, the LOUISIANA LAND and EXPLORATION COMPANY and ANADARKO PRODUCTION COMPANY, UNION OIL COMPANY OF CALIFORNIA, et al., *Intervenors-Appellants.*

Argued and Submitted July 11, 1986.

Decided Jan. 13, 1988.

As Amended July 1, 1988.

Before GOODWIN, WALLACE and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

This appeal presents the question whether federal agencies violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, or the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.*, by selling oil and gas leases on 1,300,000 acres of national

forest land in Montana without preparing either an environmental impact statement (EIS) or a comprehensive biological opinion encompassing the impact of post-leasing activities on threatened or endangered species. The district court ruled that the sale of the leases without an EIS or a comprehensive biological opinion violated both NEPA and the ESA, 605 F.Supp. 107. We affirm the judgment of the district court in part, reverse in part, and remand for further proceedings.

I

FACTS AND PROCEDURAL HISTORY

The Flathead National Forest in northwestern Montana is a vast tract of rugged mountainous wilderness. Its many lakes and rivers provide exceptionally pure surface water, prized for trout fishing, and its undisturbed ecosystem is a sustaining habitat not only for game animals, but also for the bald eagle, the peregrine falcon, the gray wolf, and the grizzly bear — all listed as threatened or endangered species under the ESA.[1] The Gallatin National Forest in south-central Montana provides a tremendous diversity of natural resources. Its rugged landscape of mountains, valleys, and rivers supports abundant fish and wildlife populations, while portions of the forest also provide important timber reserves for the local logging industry. Bordered on the south by Yellowstone National Park, the Gallatin is the watershed for some of the nation's most important trout waters, including the blue-ribbon Madison River. Big game populations also teem in the wilds of the Gallatin, and 30,000 acres there have been identified as essential grizzly bear habitat.

Beneath the surface of these vast and beautiful national forests lies the reason for this litigation. Both forests are located in the geologic zone known as the Overthrust Belt,

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[1] The grizzly bear is listed as "threatened." The bald eagle, peregrine falcon, and gray wolf are listed as "endangered."

a formation running north-south from Canada to Mexico and thought to be a rich source of petroleum deposits. Since 1970, preliminary seismic explorations as well as oil seeps discovered in the area have triggered an avalanche of applications to the Bureau of Land Management (BLM) for oil and gas leases within the boundaries of the two forests.

In February and March of 1981, the United States Forest Service issued environmental assessments[2] (EAs) recommending that a total of 1,300,000 acres of land in the Flathead and Gallatin National Forests be leased for oil and gas development.[3] Based on these EAs, the Forest Service also issued Decision Notices and Findings of No Significant Impact (FONSIs),[4] which conclude that the mere sale of oil and gas leases in the forests will have no significant impact on the human environment. The issuance of the FONSIs obviated the need for EISs at the lease sale phase of the project. *See* 40 C.F.R. § 1508.13 (1985).

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[2] Environmental assessments are less formal and less rigorous than environmental impact statements.

[3] *Environmental Assessment*, Nonwilderness Gas and Oil Leasing in the Flathead National Forest, February 18, 1981 (Excerpts of Record (E.R.) at 175) (Flathead EA); *Environmental Assessment*, Nonwilderness Gas and Oil Leasing in the Gallatin National Forest, March 4, 1981 (E.R. at 311) (Gallatin EA).

Although lease applications are filed with the Bureau of Land Management (BLM), the Forest Service has primary responsibility for both making recommendations as to specific lease sales and performing the environmental analyses required by NEPA. *See* 49 Fed.Reg. 37,440 (1984). The BLM may accept or reject the Forest Service recommendation based on the BLM's independent evaluation, but in practice the BLM generally accepts the Forest Service recommendations.

[4] *Decision Notice and Finding of No Significant Impact*, Nonwilderness Gas and Oil Leasing in the Flathead National Forest, February 18, 1981 (E.R. at 176) (Flathead FONSI); *Decision Notice and Finding of No Significant Impact*, Nonwilderness Gas and Oil Leasing in the Gallatin National Forest, March 4, 1981 (E.R. at 312) (Gallatin FONSI).

Following the preparation of the EAs and the FONSIs, the BLM sold over 700 leases for oil and gas exploration, development, and production on 1,350,000 acres within the two forests. The leases fall into two basic categories depending on the nature of the stipulations written into the lease to ameliorate the environmental impact of oil and gas activities.[5] Some of the leases contain "no surface occupancy" (NSO) stipulations. On their face, these NSO stipulations appear to prohibit lessees from occupying or using the surface of the leased land without further specific approval from the BLM. Leases fully governed by an NSO stipulation are referred to herein as "NSO leases." Leases not governed by an NSO stipulation, which we refer to as "non-NSO leases," contain the Forest Service's standard stipulations for environmental protection and, in some cases, special stipulations to protect particularly sensitive areas.[6] These standard and special stipulations, which we refer to collectively as "mitigation stipulations," authorize the government to impose reasonable conditions on drilling, construction, and other surface-disturbing activities; unlike NSO stipulations, however, they do not authorize the government to preclude such activities altogether.

In addition to issuing the EAs and FONSIs under NEPA, the Forest Service also initiated formal consultations with the Fish and Wildlife Service (FWS), as required under the ESA, 16 U.S.C. § 1536(b),[7] for the purpose of determining whether the surface-disturbing activities of the oil and gas lessees might jeopardize the continued existence of threatened or endangered species. Both the Forest Service and the FWS decided there was insufficient information

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[5] By "oil and gas activities," we include all activities undertaken by oil and gas lessees, including exploration, development, production, and abandonment.

[6] Apparently even NSO leases may include the standard stipulations. *See* Flathead EA at 67 (Appendix E) (E.R. at 245).

[7] *See infra* Part III, 1451-58.

about the nature of post-leasing oil and gas activities to render a comprehensive biological opinion considering anything more than the lease sale itself. Instead the FWS proposed ongoing consultation and preparation of additional biological opinions at various stages of post-leasing activities.

Following the issuance of the FONSIs, the EAs, and the biological opinions, administrative appeals were filed by James Conner, the Montana Wildlife Federation, and the Madison-Gallatin Alliance (appellees). *See* 36 C.F.R. § 211.19 (1980). Protests were also filed with the BLM in order to prevent leasing before the administrative proceedings were concluded. *See* 43 C.F.R. § 4.450-2 (1980). These appeals and protests were rejected and in 1982 leasing began in both the Flathead and Gallatin Forests.

Having exhausted their administrative remedies, the appellees then filed this action in federal district court in Montana, claiming that the sale of the leases without an EIS violated NEPA and that the sale of the leases without a biological opinion assessing the impact of post-leasing activities on the threatened and endangeredspecies violated the ESA.

The district court granted appellees summary judgment on both their NEPA and ESA claims. *Conner v. Burford*, 605 F.Supp. 107 (D.Mont. 1985). The court reasoned that NEPA requires a comprehensive EIS at the lease sale stage to project and analyze the cumulative effects of successive, interdependent steps culminating in oil and gas development and production. *See id.* at 108 (citing *Thomas v. Peterson*, 753 F.2d 754, 757 (9th Cir. 1985)). Otherwise, the court feared, "a piecemeal invasion of the forests would occur, followed by the realization of a significant and irreversible impact." 605 F.Supp. at 109. Not even the NSO stipulations in some of the leases allayed the court's concerns: "[t]he issuance of a lease with an NSO stipulation does not guarantee an EIS before any development would occur." *Id.* Accordingly, the court ruled that

the Forest Service's failure to prepare an EIS prior to the sale of any lease within the two national forests violated NEPA. In addition, the court ruled that the biological opinions of the FWS were inadequate to satisfy the ESA because they failed to address the effects of oil and gas activities beyond the lease sale phase. The court reasoned this failure would lead to a piecemeal evaluation of the project consequences and a progressive "chipping away" of important habitat. *Id.* at 109.

The district court ordered all "the agency actions allowing the issuance of the oil and gas leases on the Flathead and Gallatin National Forests . . . set aside" and enjoined the government from issuing or recommending any more leases until it complied with NEPA and the ESA. *Id.* Soon after judgment was entered, and before the original federal defendants filed a notice of appeal, a number of lessees of lands within the two forests[8] sought to intervene as necessary and indispensable parties under Fed.R.Civ.P. 19. The lessees also filed motions to vacate, reconsider, or amend the judgment, arguing that the district court had deprived them of due process by adjudicating their property interests without notice and an opportunity to be heard. The district court refused to reopen its judgment but granted the lessees' motion to intervene for the limited purpose of appeal.[9]

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[8] The Mountain States Legal Foundation, the Rocky Mountain Oil and Gas Association, the Independent Petroleum Association of America, and the Independant Petroleum Association of Mountain States also intervened. For convenience, we refer to all the intervenor-appellants as the "lessees."

[9] The district court granted the motion to intervene "for purposes of protecting the right to appeal." *See* Clerk's Record (C.R.) 116. Because the lessees "step into the shoes of the defendants for the purposes of appeal," they may raise those issues which the federal defendants raised in the district court. *See Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983).

On appeal, the federal appellants[10] and the lessees argue that both NSO and non-NSO leases were validly sold without the preparation of an EIS because the leases contain restrictions on surface-disturbing activities which protect the environment from significant effects.[11] Additionally, they continue to assert that the limited biological opinions prepared by the FWS satisfied the requirements of the ESA. The lessees separately argue that appellees' action is barred by mootness, estoppel, laches, and the statute of limitations, that the district court abused its discretion by not reopening the case below, that the lessees are necessary and indispensable parties, and that the district court judgment deprived them of property without due process in violation of the Fifth Amendment.

We agree with appellants that the district court erred in ruling that the government violated NEPA when it sold

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[10] We refer to the original federal defendants as the "federal appellants."

[11] The government does not appeal that portion of the judgment which set aside the agency actions in issuing non-NSO leases in "roadless" areas of the two forests. *See* Brief for the Federal Appellants at 14,37-38. The Forest Service Manual defines a "roadless area" as "[a]n area of undeveloped Federal land within which there are not improved roads maintained for travel by means of motorized vehicles intended for highway use." FSM § 8260(b)(3)(a)(1). The distinction between "roadless" and "roaded" areas is relevant only to the point that the roadless areas studied in the two EAs continue to be eligible for "wilderness" designation in the future. *See California v. Block*, 690 F.2d 753 (9th Cir. 1982). Lands which are designated wildernesses receive additional environmental protections beyond those already applicable to national forest lands. Half the lands considered in the two EAs were "roaded" areas, however, that have never been considered for wilderness designation.

In explaining why it has not appealed with respect to non-NSO leases in roadless areas, the government has advised the court that the Forest Service is currently preparing an EIS for the roadless areas of the Gallatin and has recently completed a new EIS for the roadless areas of the Flathead. *See* Brief for the Federal Appellants at 14 n. 9.

NSO leases without preparing an EIS. We agree with the district court, however, that the government violated NEPA when it sold non-NSO leases without an EIS. We further agree with the district court that the government violated the ESA when it sold leases without preparing a comprehensive biological opinion on the effect of oil and gas activities on threatened and endangered species. Finally, we reject the lessees' various arguments collateral to the merits of the NEPA and ESA issues. We therefore affirm in part, reverse in part, and remand with instructions.

II

THE NEPA ISSUES

[1] Section 102(2)(C) of NEPA requires federal agencies to file an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11 (1985). If the agency finds, based on a less formal and less rigorous "environmental assessment," that the proposed action will not significantly affect the environment, the agency can issue a Finding of No Significant Impact (FONSI) in lieu of the EIS. 40 C.F.R. § 1508.13 (1985). We will uphold an agency decision that a particular project does not require an EIS unless that decision is unreasonable. *Friends of Endangered Species v. Jantzen,* 760 F.2d 976, 985 (9th Cir. 1985); *Foundation for North Am. Wild Sheep v. United States,* 681 F.2d 1172, 1177 (9th Cir. 1982). The reviewing court must assure, however, that the agency took a "hard look" at the environmental consequences of its decision. *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976); *California v. Block,* 690 F.2d 753, 761 (9th Cir. 1982).[12]

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[12] We review the district court's grant of summary judgment *de novo. Jantzen,* 760 F.2d at 981.

The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they "retain[ ] a maximum range of options." *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983); *see also* 40 C.F.R. §§ 1501.2, 1502.1 (1985); *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985); *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979) (*EDF v. Andrus*). Toward this end, the courts have attempted to define a "point of commitment" at which the filing of an enviromental impact statement is required. *Sierra Club v. Peterson*, 717 F.2d at 1414. *See* 40 C.F.R. § 1502.5(a) (1985) (EIS must be prepared at the go/no go stage). Our circuit has held that an EIS must be prepared before any irreversible and irretrievable commitment of resources.[13] *EDF v. Andrus*, 596 F.2d at 852. *Accord Sierra Club v. Peterson*, 717 F.2d at 1414 (citing cases). Thus, in this case we must decide whether the sale of any of the oil and gas leases within the two forests constituted an irreversible and irretrievable commitment of federal forest land to surface-disturbing oil and gas activities that could have a significant impact on the environment.

In this case the Forest Service gave three justifications for its finding that none of the proposed leases would have a significant impact on the human environment:

(a) The Environmental Assessment and the analysis it documents conform with the guidance and management requirements given in the [Gallatin and Flathead National Forest Multiple Use Plans].

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[13] The "irreversible and irretrievable commitment of resources" criterion is derived from 42 U.S.C. § 4332(C)(v) which requires an EIS to include a statement of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." Obviously this requirement only makes sense if the EIS is prepared prior to the commitment of resources.

(b) The resulting action for which this environmental analysis is made will be the granting or denying of leases. This, in and of itself, will have no environmental effect. Surface-disturbing activities that are conducted as a result of granting gas and oil leases will be analyzed on a case-by-case basis, and further environmental analyses will be prepared as required by the National Environmental Policy Act.

(c) Appropriate standard and special stipulations will prevent or mitigate much of the adverse environmental impacts from gas and oil activities.

Gallatin FONSI at 2 (E.R. at 313); *see also* Flathead FONSI at 2 (E.R. at 177). Appellants add that, at the very least, the sale of an NSO lease cannot be considered to have a significant effect on the environment because, absent further government approval, the NSO leases absolutely prohibit surface-disturbing activity. We consider the validity of the agency's findings of no significant environmental impact with respect to the NSO leases separately from the validity of its findings with respect to the non-NSO leases.

A. The NSO Leases

[2] For the purposes of this opinion, NSP leases are those leases that absolutely forbid the lessee from occupying or using the surface of the leased land[14] unless a modification of the NSO stipulation is specifically approved by the

[14] Because we are not faced with a challenge to any specific activity, we need not address what constitutes a "surface-disturbing activity" prohibited by the NSO stipulation.

BLM.[15] Without approval of specific surface-distributing activity, development of the oil and gas reserves underlying the surface of an NSO lease can only occur through directional (slant) drilling from a parcel not burdened by an NSO stipulation or by well spacing over a large reservoir such that no wells are located on the NSO leasehold. Of approximately 709 leases sold thus far, only 57 are governed by NSO stipulations in their entirety, but around 500 leases contain NSO stipulations covering a portion of the leased property.

Appellants argue that the sale of an NSO lease has *no* effect on the environment, let alone a significant one. They assert that such leases make no commitment of any part of the national forests to surface-disturbing activities by the lessees because the government retains *absolute* authority to decide whether any such activities will ever take place

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[15] On remand, the district court shall determine which leases are in fact NSO leases within the meaning of this opinion because it is not clear whether, as a matter of contract interpretation, every lease with a "no surface occupancy"(NSO) stipulation provides absolute protection against surface-disturbing activity. The blanket "No Surface Occupancy Stipulation" in the record would seem to provide such protection, but we cannot determine from the record what alterations or additions to the stipulation have been made in individual cases. Moreover, it appears that some leases included both the NSO provision and a Surface Disturbance Stipulation which provides in part that the Forest Service may only impose "such reasonable conditions, *not inconsistent with the purposes for which this lease is issued*, as the Supervisor may require to protect the surface of the leased lands and the environment." *See* Flathead EA at 68 (Appendix E)(E.R. at 246) (emphasis added). If so, the language of the Surface Disturbance Stipulation would have to be construed with the NSO Stipulation to determine which was intended to govern the lease. The analysis that follows in Part II(A) of this opinion applies only if the language of the stipulation, construed with the rest of the lease, absolutely prohibits surface disturbance in the absence of specific government approval.

on the leased lands.[16] The district court disagreed, holding that the issuance of an NSO lease was an irreversible commitment of national forest land. The court reasoned, "The issuance of a lease with an NSO stipulation does not guarantee an EIS before any development would occur. In fact, NSO stipulations can be modified or removed without an EIS." 605 F.Supp. at 109.

We disagree with the district court's ruling that the sale of an NSO lease is an irreversible commitment of resources requiring the preparation of an EIS. In ruling that the NSO stipulation could be modified without the preparation of an EIS, the district court evidently relied on a provision in the NSO stipulation which reads: "The [NSO stipulation] may be modified when specifically approved in writing by the District Engineer, Geological Survey with concurrence of the authorized officer of the surface management agency." E.R. at 250. The mere inclusion of such a clause in the lease has no effect, however, on the obligation of the surface management agency to comply with NEPA. Modification or removal of an NSO stipulation would have the same effect as the sale of a non-NSO lease, which, as discussed below, would constitute an irretrievabie commitment of resources requiring the preparation of an EIS. Contrary to the assumptions of the district court, NSO provisions cannot be freely altered without an EIS. We cannot assume that government agencies will not comply with their NEPA obligations in later stages of development. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971) (agency action entitled to presumption of regularity).

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[16] Despite this absolute control by the government, NSO leases have economic value because they give the lessees the exclusive right of development, should development be allowed. In this sense, an NSO lease is effectively a right of first refusal to produce oil and gas on the leased premises. Moreover, oil and gas reserves may be tapped without disturbing the surface (and thus without governmental approval under an NSO provision), through directional drilling or well spacing.

Thus, we believe that piecemeal invasion of the forests will be avoided because, as the federal appellants concede, *see* Brief for the Federal Appellants at 32, government evaluation of surface-disturbing activity on NSO leases must include consideration of the potential for further connected development and cumulative impacts from all oil and gas development activities pursuant to the federal leases. *See Thomas v. Peterson*, 753 F.2d 754, 757-61 (9th Cir. 1985); 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(a)(1), (2) (1985).

We find support for our conclusion in *Sierra Club v. Federal Energy Regulatory Commission*, 754 F.2d 1506 (9th Cir. 1985) (*Sierra Club v. FERC*). There, the Federal Energy Regulatory Commission (FERC) granted a "preliminary permit" for the construction and maintenance of hydroelectric facilities on the Tuolumne River in California. The Sierra Club and others challenged FERC's failure to prepare an EIS before granting the permit. We rejected that challenge because the permit gave the applicant no entitlement to conduct any studies on federal land. *Id.* at 1509-10. Instead, "[t]he sole purpose of the preliminary permit is to maintain the applicant's priority of application for a license," and the applicants can only enter federal land after obtaining Forest Service and BLM special use permits. *Id.* at 1509.

In sum, we hold that the sale of an NSO lease cannot be considered the go/no go point of commitment at which an EIS is required. What the lessee really acquires with an NSO lease is a right of first refusal, a priority right much like the one granted in *Sierra Club v. FERC*. This does not constitute an irretrievable commitment of resources. *Cf. Colorado River Water Conservation District v. United States*, 593 F.2d 907, 909-910 (10th Cir. 1977) (contract to supply water, contingent upon subsequent preparation of EIS and approval by Secretary of the Interior, does not constitute an irretrievable commitment of resources). Thus, we reverse the district court's judgment as it relates

to NSO leases and remand with instructions for the court to determine which leases were NSO leases within the meaning of this opinion. *See supra* note 15.

B. The Non-NSO Leases

We next consider whether the sale of non-NSO leases without an EIS violates NEPA.[17] The mitigation stipulations in non-NSO leases permit reasonable regulation of surface-disturbing activities to reduce their impact on the environment. These stipulations do not, however, preclude the lessees from engaging in surface-disturbing

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[17] The federal appellants do not challenge on appeal that portion of the district court's judgment that applies to non-NSO leases located in "roadless" areas of the two forests. *See supra* note 11. Their arguments as to the validity of non-NSO lease sales without an EIS are limited to lease sales in "roaded" areas only. The lessees, however, appeal the judgment below as applied to non-NSO leases in both roaded and roadless areas. Because the federal appellants raised the issue of non-NSO leases in roadless areas below, *see* C.R. 124, the lessees may raise this issue on appeal. *See supra* note 19.

In distinguishing between roadless and roaded areas in the two forests, all appellants argue that oil and gas development and production will have comparatively little impact on roaded areas. However, we find nothing in the record to show that the mere fact that a parcel of national forest land is "roaded" renders the environmental impact oil and gas activities insignificant. In fact, there is nothing in the record to indicate that the effects of oil and gas activities in roaded areas are generally less severe than their effects in roadless areas. The EAs do not attempt to distinguish roaded land as significantly less affected by oil and gas development and production than roadless areas. Indeed, it seems to us that the cumulative impact of oil and gas activities in an area already somewhat disturbed by human contact could be even more significant than similar activities in a more pristine area. Since we find nothing in the record to support appellants' position, we reject the suggestion that our analysis should treat roaded areas differently from roadless areas.

activities altogether.[18] They may, for example, build roads and drill for oil, subject only to reasonable mitigation measures. Accordingly, we must decide whether the government's right to regulate, rather than preclude, surface-disturbing activities protects the forest environment from significant adverse effects, obviating the need for an EIS at the lease sale stage.

The identical question was decided by the District of Columbia Circuit in *Sierra Club v. Peterson*, 717 F.2d 1409, 1412-15 (D.C. Cir. 1983). In that case, the government sold oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without first preparing an EIS. All leases contained standard and special mitigation stipulations for the protection of the environment, many of which were identical to the stipulations used in this case. *Sierra Club v. Peterson*, 717 F.2d at 1411 & nn. 4 & 5.[19] Standard stipulations provide that any surface-disturbing activity on the leases is conditional on compliance with additional NEPA analysis, including an EIS if appropriate. Special stipulations provide for the protection of particularly sensitive areas through various restrictions as to (1) timing of surface occupancy (to prevent human activity during critical periods in animal lifecycles), (2) frequency of road use (to minimize human/animal contact), or (3) location of surface activity (to avoid activity near recreation areas, steep slopes, unstable soils, or occupied wildlife habitat).

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[18] By asserting that the government cannot prevent surface-disturbing activities altogether, we do not intend to impugn the government's independent statutory authority under the ESA to prevent any actions which would jeopardize threatened or endangered species. *See infra* Part III, pp. 1451-58. Because that authority does not extend to the myriad of significant environmental effects outside the narrow issue of species survival, we do not consider it here.

[19] Additionally, NSO stipulations were attached to leases of lands designated "highly environmentally sensitive." *Sierra Club v. Peterson*, 717 F.2d at 1411 & n. 3.

The Forest Service may also require that operators mitigate detrimental effects on the environment through relocation, testing, and salvage. Thus, in *Sierra Club v. Peterson,* the Forest Service was able to condition its approval of surface-disturbing activity on the timing, coordination, and extent of exploratory drilling and other post-leasing operations. The District of Columbia Circuit concluded, however, that "[o]n land leased without a No Surface Occupancy Stipulation the Department *cannot* deny the permit to drill; it can only impose 'reasonable' conditions which are designed to mitigate the evironmental impacts of the drilling operations." 717 F.2d at 1411; *cf. EDF v. Andrus,* 596 F.2d at 852 (Interior Department cannot execute water option contracts without preparing an EIS because once granted, the contracts prohibit government from "unilaterally changing its mind.").

The District of Columbia Circuit found the distinction between the NSO and non-NSO leases critical. Even though the standard and special mitigation stipulations provided a modicum of protection for the environment, the court held that the sale of non-NSO leases entailed an irrevocable commitment of land to significant surface-disturbing activities, including drilling and roadbuilding, and that such a commitment could not be made under NEPA without an EIS. 717 F.2d at 1414-15.

[3] We agree with the conclusions of the District of Columbia Circuit in *Sierra Club v. Peterson.* As in that case, the non-NSO leases in our case do not reserve to the government the absolute right to prevent all surface-disturbing activity. Indeed, one of the mitigation stipulations used both here and in *Sierra Club v. Peterson* specifically limits government control over post-leasing activities to reasonable regulations which are consistent with oil and gas development and production:

> *Notwithstanding any provision of this lease to the contrary,* any drilling, construction, or other operation on the leased lands that will disturb the

> surface thereof or otherwise affect the environment . . . conducted by lessee shall be subject, as set forth in this stipulation, to prior approval of such operation by the Area Oil and Gas Supervisor . . . *and to such reasonable conditions, not inconsistent with the purposes for which this lease is issued,* as the Supervisor may require to protect the surface of the leased lands and the environment.

Flathead EA at 68 (Appendix E) (BLM Surface Disturbance Stipulations, Form 3109-5)(E.R. at 246)(emphasis added); *see also Sierra Club v. Peterson*, 717 F.2d at 1411 n.4. (" 'standard' stipulations include Stipulation for lands under jurisdiction of the Department of Agriculture, 3109-3 . . . , the Surface Disturbance Stipulation, 3109-5 . . . , and the Forest Service Supplement to Form 3109-3. . . ."). Because the purpose of the leases sold in the Flathead and Gallatin National Forests is oil and gas exploration, development, and production, it would clearly be inconsistent with the purpose of the leases if the government prevented all drilling, roadbuilding, pipe-laying, and other lease-related surface-disturbing activities.[20] Yet it is also clear that those activities are likely, if not certain, to significantly affect the environment. As the Flathead EA specifically notes, "It is generally acknowledged that in areas where substantial oil and gas reserves are discovered, the effects of development and production become broad in extent." Flathead EA at 8 (E.R. at 188).

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[20] We recognize that in some cases, directional drilling or well spacing on other parcels would permit production to occur without disturbing the surface of the leased land. *See supra* p. 1447.

We are unpersuaded by appellants' argument that the mitigation measures reduce the effects of even oil and gas exploration, development, and production activities to environmental insignificance. We understand that the mitigation stipulations enable the government to regulate many of the adverse environmental impacts of oil and gas activities. We seriously question, however, whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance. NEPA does not require that mitigation measures *completely* compensate for the adverse environmental effects of post-leasing oil and gas activities, *see Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985), but an EIS must be prepared as long as "substantial questions" remain as to whether the measures will completely preclude significant environmental effects. *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986); *Foundation for North Am. Wild Sheep v. United States*, 681 F.2d 1172, 1180-81 (9th Cir. 1982). Thus, even if there is a chance that regulation of surface-disturbing activities will render insignificant the impacts of those activities, that possibility does not dispel substantial questions regarding the government's ability to adequately regulate activities which it cannot absolutely preclude. In sum, we agree with the district court that the government violated NEPA by selling non-NSO leases without preparing an EIS.

[4] Appellants also complain that the uncertain and speculative nature of oil exploration[21] makes preparation of an EIS untenable until lessees present precise, site-specific proposals for development.[22] The government's

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[21] Less than 10 percent, on average, of noncompetitive leases yield an oil strike and less than 2 percent lead to actual development.

[22] Appellants do not address the fact that exploration activities themselves may significantly affect the environment, thus requiring the preparation of an EIS.

inability to fully ascertain the precise extent of the effects of mineral leasing in a national forest is not, however, a justification for failing to estimate what those effects might be before irrevocably committing to the activity. *Cf. EDF v. Andrus,* 596 F.2d at 851 (uncertainty about environmental impact of use of water diverted pursuant to option contract "does not obviate the importance of the decision to divert and the necessity to evaluate the environmental consequences of that decision"). Appellants' suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid.

Moreover, we agree with the District of Columbia Circuit in *Sierra Club v. Peterson* that the option of selling NSO leases rather than non-NSO leases provides a reasonable alternative approach for oil and gas leasing in the face of uncertainty:

> If . . . the Department is in fact concerned that it cannot foresee and evaluate the environmental consequences of leasing without site-specific proposals, then it may delay preparation of an EIS provided that it reserves both the authority to *preclude* all activities pending submission of site-specific proposals and the authority to *prevent* proposed activities if the environmental consequences are unacceptable. If the Department chooses not to retain the authority to *preclude* all surface disturbing activities, then an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment — when the leases are issued. The Department can decide, in the first instance, by which route it will proceed.

717 F.2d at 1415.[23]

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[23] Although the validity of the issuance of NSO leases without the benefit of an EIS was not before the court in *Sierra Club v. Peterson*, 717 F.2d at 1412, the court clearly felt that the NSO alternative was a legitimate alternative for dealing with uncertainty under NEPA.

In sum, the sale of a non-NSO oil or gas lease constitutes the "point of commitment;" after the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment. By relinquishing the "no action" alternative without the preparation of an EIS, the government subverts NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values. The "heart" of the EIS — the consideration of reasonable alternatives to the proposed action — requires federal agencies to consider seriously the "no action" alternative before approving a project with significant environmental effects. 40 C.F.R. § 1502.14(d) (1985). That analysis would serve no purpose if at the time the EIS is finally prepared, the option is no longer available. We agree with the District of Columbia Circuit that unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases. *See Sierra Club v. Peterson*, 717 F.2d at 1412-15; *see also Cady v. Morton*, 527 F.2d 786, 793-95 (9th Cir. 1975) (EIS required for decision to issue coal leases); Dept. of the Interior, 516 Dept. Manual 4.3A, promulgated at 45 Fed. Reg. 27,541, 27,546 (1980) ("The feasability analysis (go/no-go) state, at which time an EIS is to be completed, is to be interpreted as the stage prior to the first point of major commitment to the proposal. For example, this would normally be at . . . the leasing stage for mineral resource proposals."); *cf. South Dakota v. Andrus*, 614 F.2d 1190, 1194-95 (8th Cir. 1980)(issuance of mineral patent not a major federal action, because *unlike a lease*, mineral patent not a precondition to initiation of mining operations). We therefore affirm the district court's ruling on the NEPA issues with respect to those leases which, on remand, it determines are not NSO leases within the meaning of this opinion.

III

THE ENDANGERED SPECIES ACT ISSUES

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires the Secretary of the Interior to ensure that an action of a federal agency is not likely to jeopardize the continued existence[24] of any threatened or endangered species.[25] Section 7(b) sets out a process of consultation whereby the agency with jurisdiction over the protected species issues to the Secretary a "biological opinion" evaluating the nature and extent of jeopardy posed to that species by the agency action. 16 U.S.C. § 1536(b). The agency proposing the action (action agency) must provide the Secretary with "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). If the biological opinion concludes that the proposed action is likely to jeopardize a protected species, the action agency must modify its proposal.[26] In addition, section 7(d) forbids

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[24] " 'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Interagency Cooperation — Endangered Species Act of 1973, As Amended, 51 Fed. Reg. 19,958 (1986) (codified at 50 C.F.R. § 402.02 (1986)).

[25] Section 7(a)(2) provides more fully: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

[26] Under certain limited circumstances, the agency may be able to obtain an exemption under sections 7(g) and 7(h). *See* 16 U.S.C. § 1536(g), (h).

"irreversible or irretrievable commitment of resources" during the consultation process.[27]

In this case, the ESA consultation process was triggered when the Forest Service notified the Secretary that the sale of oil and gas leases in the Flathead and Gallatin National Forests, proposed pursuant to the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 181 *et. seq.*, might affect threatened and endangered species living there, including the grizzly bear, the bald eagle, the peregrine falcon, and the gray wolf.[28] The Secretary, through the FWS,[29] issued biological opinions assessing the environmental effects of the lease sales. The FWS divided the oil and gas activities into stages and addressed the effects of only the leasing stage, concluding that there was "insufficient information available to render a comprehensive biological opinion beyond the initial lease phase." Gallatin Biological Opinion at D2-3 (E.R. at 396-97); *see also* Flathead Biological Opinion at 92 (E.R. at 273). Thus, the biological opinions of the FWS, which concluded that leasing itself was not likely to jeopardize the protected species, did not assess the potential impact that post-leasing oil and gas activities might have on protected species. Rather the FWS opinions relied on "incremental-step consultation," contemplating that additional biological evaluations would be prepared

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[27] Section 7(d) provides in full: "After initiation of consultation required under subsection (a)(2) . . . , the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2). . . ." 16 U.S.C. § 1536(d).

[28] *See* Threatened and Endangered Species Biological Evaluation (Flathead EA, Appendix G) at 82 (E.R. at 260); Biological Evaluation (Gallatin EA, Appendix B) at B1 (E.R. at 365).

[29] *See* Interagency Cooperation — Endangered Species Act of 1973, As Amended, 51 Fed.Reg. 19,957 (1986) (codified at 50 C.F.R. § 402.01(b) (1986)).

prior to all subsequent activities and that lessees' development proposals would be modified to protect species: "[A]dditional consultation will be required for each of the subsequent phases of oil and gas activities." Gallatin Biological Opinion at D3 (E.R. at 397); *see also* Flathead Biological Opinion at 91-92 (E.R. at 272-73).

The district court rejected the biological opinions because they were limited to the lease sale stage, holding that the FWS "violated ESA by failing to analyze the consequences of all stages of oil and gas activity on the forests." *Conner v. Burford*, 605 F.Supp. at 109. Appellants had argued that various lease stipulations protected the species by allowing for intervention if subsequent oil and gas activities, such as development and production, should threaten to jeopardize species' continued existence. By indicating that the lease issuance could proceed only on the basis of a "comprehensive" biological opinion which considered not only the leasing stage but leasing and all post-leasing activities, the district court effectively held that incremental-step consultation violates the ESA.

Reviewing *de novo* the district court's grant of summary judgment, we will not reverse the FWS' decision to limit the biological opinion to the lease sale stage unless that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 981-82 (9th Cir. 1985). On this record, we agree with the district court that the FWS' decision was not in accordance with the law.

A. The Limited Scope of the Biological Opinions

The parties agree that *before* any leases could be sold, the FWS was required to prepare a biological opinion. *See, e.g. Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985) (Forest Service's failure to prepare biological assessment *prior* to decision to build road violated ESA). The ESA requires that the biological opinion detail "how the *agency action* affects the species or its critical habitat."

16 U.S.C. § 1536(b)(3)(A) (emphasis added). Thus, the scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action. *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980), *aff'g in part, rev'g in part*, 486 F.Supp. 332 (D.D.C. 1980) (legal adequacy of a 'biological opinion' tested by matching the meaning of 'agency action' with a legal definition of term). We interpret the term "agency action" broadly. *TVA v. Hill*, 437 U.S. 153, 173 & n. 18, 98 S.Ct. 2279, 2291 & n. 18, 57 L.Ed.2d 117 (1978). As the District of Columbia Circuit has noted, "[c]aution can only be exercised if the agency takes a look at all the possible ramifications of the agency action." *North Slope*, 642 F.2d at 608 (quoting *North Slope*, 486 F.Supp. at 351).

[5] In *North Slope*, which involved an offshore oil lease sale under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et. seq.*, the District of Columbia Circuit held that the "agency action" encompassed the entire leasing project, from the issuance of the leases through post-leasing development and production: " '[P]umping oil' and not 'leasing tracts' is the aim of congressional [mineral leasing] policy." *North Slope*, 642 F.2d at 608. Following the District of Columbia Circuit, we hold that agency action in this case entails not only leasing but leasing and all post-leasing activities through production and abandonment. Thus, section 7 of the ESA on its face requires the FWS in this case to consider all phases of the agency action, which includes post-leasing activities, in its biological opinion. Therefore the FWS was required to prepare, at the leasing stage, a comprehensive biological opinion assessing whether or not the agency action was likely to jeopardize the continued existence of protected species, based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Both the Flathead and Gallatin biological opinions pay lip service to this statutory duty. Each contains the statement that the "action" being considered "includes not just final lease issuance but all resulting subsequent activities." Gallatin Biological Opinion at D3 (E.R. at 397); *see also* Flathead Biological Evaluation at 82 (E.R. at 260). However, as noted above, both biological opinions concluded that there was insufficient information pertaining to the specific location and extent of post-leasing oil and gas activities to render a comprehensive biological opinion beyond the initial lease stage.

[6] Appellees argue that the FWS failed to prepare biological opinions based on the best data available. We agree. The FWS took the position that there was insufficient information on post-leasing activities to prepare comprehensive biological opinions. Although we recognize that the precise location and extent of future oil and gas activities were unknown at the time, extensive information about the behavior and habitat of the species in the areas covered by the leases was available. For example, appellees point out that three-fourths of the area studied in the forests had been designated "essential" or "occupied" habitat for protected species. *See* Appellees' Exhibit 11. Indeed, the environmental assessments prepared by the Forest Service contained detailed information on the behavior and habitats of the species, and discussed the likely impact of various stages of oil and gas activities. *See* Threatened and Endangered Species Biological Evaluation (Flathead EA, Appendix G) (E.R. at 260-87); Biological Evaluation (Gallatin EA, Appendix B) (E.R. at 311-95); *see also* Gallatin Biological Opinion at D7 (E.R. at 401).

We agree with appellees that incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available. 16 U.S.C. § 1536 (a)(2). With the post-leasing and

biological information that was available, the FWS could have determined whether post-leasing activities in particular areas were fundamentally incompatible with the continued existence of the species. Indeed, by recommending the exclusion of areas where leasing would conflict with the conservation of protected species, the FWS implicitly admitted that even minimal exploration and development would be incompatible with the conservation of the species in some areas that can be identified before any agency action is taken.[30] Gallatin Biological Opinion at D7 (E.R. at 401). With the information available, the FWS could also have identified potential conflicts between the protected species and post-leasing activities due to the cumulative impact of oil and gas activities. For example, species like the grizzly and the gray wolf require large home ranges making it critical that ESA review occur early in the process to avoid piecemeal chipping away of habitat. *See id.*

Furthermore, although the FWS justified the decision to delay completing comprehensive biological opinions on the inexact information about post-leasing activities. Congress, in enacting the ESA, did not create an exception to the statutory requirement of a comprehensive biological opinion on that basis. The First Circuit, for example, has recognized that the Secretary may be required to make projections, based on *potential* locations and levels oil and gas activity, of the impact of production on protected species. *See Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1052-55 (1st Cir. 1982) (EPA must prepare "real time simulation" studies of low risk oil spills despite the fact that study will only produce informed estimate of potential environmental effects).

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[30] The FWS has also emphasized that "waiting until completion of a project specific evaluation to . . . apply *existing* biological data to formulate the necessary restrictions may result in . . . areas being released for surface occupancy that, in fact, have no opportunity for surface occupancy due to irresolvable conflicts with wildlife resources." Gallatin Biological Opinion at D6 (E.R. at 400).

In light of the ESA requirement that the agencies use the best scientific and commercial data available to insure that protected species are not jeopardized, 16 U.S.C. § 1536(a)(2), the FWS cannot ignore available biological information or fail to develop projections of oil and gas activities which may indicate potential conflicts between development and the preservation of protected species. We hold that the FWS violated the ESA by failing to use the best information available to prepare comprehensive biological opinions considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2). To hold otherwise would eviscerate Congress' intent to "give the benefit of the doubt to the species."[31]

B. Incremental-Step Consultation as a Substitute for Comprehensive Biological Opinions

[7] Appellants argue that the ESA's mandate to protect species is satisfied without a comprehensive biological opinion if an incremental-step consultation process is written into the leases. Specifically, appellants argue that the requirements of the ESA are satisfied by Threatened and Endangered Species (T & E) stipulations contained in each lease which provide:

> The Federal surface management agency is responsible for assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or

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[31] H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S.Code Cong. & Admin. News 2572, 2576.

> even disallow use and occupancy that would be in violation of the Endangered Species Act of 1973 by detrimentally affecting endangered or threatened species or their habitats.[32]

Appellants reason that the T & E stipulations ensure that there will be adequate environmental review prior to the initiation of any activity which might jeopardize protected species.[33] They argue that since the T & E stipulations reserve to the government the authority to absolutely *preclude* any activity likely to jeopardize a species, the need for a comprehensive biological opinion at the initial lease phase is obviated.

Appellants ask us, in essence, to carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion — in this case one addressing the effects of leasing and all post-leasing activities — be completed before initiation of the agency action. They would have us read into the ESA language to the effect that a federal agency may be excused from this requirement if, in its judgment, there is insufficient information available to complete a comprehensive opinion and it takes upon itself incremental-step consultation such as that embodied in

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[32] E.R. at 249.

[33] Appellants do not mention in their briefs that the second paragraph of the T & E stipulations provides that the lessee "may, unless notified by the authorized officer of the [] agency that the examination is not necessary, conduct the examination . . . at his discretion and cost . . . by or under the supervision of a qualified resources specialist approved by the [] agency." *See* E.R. at 249. Thus, the T & E stipulations not only fail to guarantee that examinations will be undertaken by the FWS, they also fail to guarantee that the examinations will be undertaken at all.

the T & E stipulations.[34] We reject this invitation to amend the ESA. That it is the role of Congress, not the courts.

Appellants argue that their position — that an incremental-step consultation process is consistent with the ESA — is supported by *North Slope*. 642 F.2d 589. However, we read *North Slope* as supporting our view that incremental-step consultation does not vitiate the ESA requirement that the Secretary prepare a comprehensive biological opinion. As noted above, the District of Columbia Circuit recognized that the ESA on its face requires that a biological opinion consider the entire agency action and stressed that OCSLA "does not attenuate ESA's notion of 'agency action.' " *Id.* at 609. The court wrestled with the apparent tension between the ESA, which requires that the entire agency action be considered in a biological opinion, and OCSLA, which provides for a segmented approach to offshore oil projects. It concluded that the two statutes were ultimately complementary because the segmented approach of OCSLA, which requires the Secretary to examine the effect of proposed oil leasing, exploration and drilling prior to their separate initiation, ensures "graduated compliance with environmental and endangered life standards." 642 F.2d at 609; *see also Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir.

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[34] Appellants argue that use of the T & E stipulation supports the FWS position that protected species concerns "under Section 7 could be addressed adequately at later stages of the action through further consultation." Brief for the Federal Appellants at 47. Relying on the T & E stipulations, appellants also suggest that the FWS' determination "that the proposed lease sales would not result in an irreversible and irretrievable commitment of resources had a well-reasoned basis." *Id.* This is beside the point. Section 7(d) does not amend section 7(a) to read that a comprehensive biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources. *See* 16 U.S.C § 1536(d). Rather, section 7(d) clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process. Section 7(d) is not an independent authorization for "incremental-step" consultation.

1979). In reaching this conclusion, the court explicitly relied on the OCSLA system of "checks and balances." 642 F.2d at 609. As the Supreme Court later noted, these "checks and balances" include careful review by the Secretary of the Interior of all activity carried out pursuant to OCSLA and "specific requirements for consultation with Congress, between federal agencies, or with the States" at every stage. *See Secretary of Interior v. California*, 464 U.S. 312, 337, 104 S.Ct. 656, 669, 78 L.Ed.2d 496 (1984).[35] These procedural guarantees led the District of Columbia Circuit to conclude that the segmented approach of OCSLA mitigated the ESA requirement that the biological opinion address all phases of the mineral leasing project.

Similarly, appellants also rely on *Village of False Pass v. Clark*, 733 F.2d 605, 609-12 (9th Cir. 1984), *aff'g*, 565 F.Supp. 1123 (D. Alaska 1983)(*False Pass*), another case involving the proposed sale of oil leases under OCSLA, to support their contention that the FWS is not required to prepare comprehensive biological opinions in this case involving lease sales under the MLA. In *False Pass*, although we acknowledged that "agency action" is broadly construed under the ESA, we concluded that the

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[35] The Supreme Court more fully explained the OCSLA procedural safeguards as follows:

> Exploration may not proceed until an exploration plan has been approved. . . . The plan must . . . be disapproved if it would "probably cause serious harm or damage . . . to the marine, coastal, or human environment. . . ." The . . . final stage is development and production. (Citation omitted). The lessee must submit another plan to Interior. . . . [This] plan may also be disapproved if it would "probably cause serious harm or damage . . . to the marine, coastal or human environments." . . . *Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production.*

Secretary of Interior v. California, 464 U.S. at 339-40, 104 S.Ct. at 670 (emphasis added).

agency action at issue was limited to the sale of leases. *Id.* at 611. We stressed that the Secretary was obligated to comply with the ESA at each stage of development, *id.* at 611 (citing *Conservation Law Foundation v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979)), and that the regulations promulgated, in part under OCSLA, made the Secretary's plan to assess the impact on marine life prior to each stage of oil development "a real safeguard." *Id.* at 612. We concluded that the requirements of the ESA were satisfied by a biological opinion that was limited to the lease sale and exploration stages.[36] Thus in *False Pass*, as in *North Slope*, we accepted a limited biological opinion on the basis of the complementary relationship between the ESA's requirements and the segmented approach of OCSLA. However, *False Pass* cannot be interpreted as authority that Congress intended to create an across-the-board exception to the ESA's biological opinion requirement.

Appellants argue that *North Slope* and *False Pass* are authority for using a similar segmented approach, "incremental-step consultation," with respect to oil and gas

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[36] Although the scope of the *False Pass* biological opinion is not entirely clear from our opinion in that case, the district court opinion explicitly notes that the biological opinion considered both "the leasing and exploration phases of development." *False Pass*, 565 F.Supp at 1157.

leases issued under the MLA.[37] The MLA, however, contains no system of "checks and balances" similar to OCSLA's. Thus there is no tension between the MLA and the ESA and hence we find no justification to obviate the ESA's congressional mandate[38] that a comprehensive biological opinion be prepared in this case. We reject both

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[37] Indeed, it is not even clear to which "incremental steps" of development appellants refer. Although the biological opinions issued in this case refer repeatedly to "the initial leasing phase" and "subsequent phases of oil and gas activities," they do not delineate the post-leasing phases. *See, e.g.*, Gallatin Biological Opinion (E.R. at 396-402). Appellants, relying on the environmental assessments prepared by the Forest Service, identify five phases of oil and gas operations: preliminary investigation, exploration, development, production, and abandonment. *See, e.g.*, Gallatin EA at 4 (E.R. at 320). By contrast, the lease sales conducted under OCSLA are *statutorily* divided into three stages: (1) lease sales, 43 U.S.C. § 1337; (2) exploration, 43 U.S.C. § 1340; and (3) development and production, 43 U.S.C. § 1351.

[38] We note that even the latest regulations promulgated by the FWS allow a partial assessment of an action *only* when the activity in question is *statutorily* segmented. *See* Interagency Cooperation — Endangered Species Act of 1973, As Amended, 50 C.F.R. § 402.14[k] (1986), 51 Fed. Reg. 19,957, 19,962 (1986) ("When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action.")

Moreover, we seriously doubt that Congress intended to give federal agencies carte blanche to initiate, *prior* to the completion of a biological opinion, any program subject to continued federal control in the absence of *specific* congressional approval such as that embodied in OCSLA.

North Slope and *False Pass* as controlling authority on this issue.[39]

Finally, appellants rely on *Cabinet Mountains Wilderness v. Perterson*, 685 F.2d 678 (D.C. Cir. 1982), a non-OCSLA case involving copper and silver exploration in a Montana wilderness area, for the proposition that biological opinions assessing onshore mineral development may be limited to the leasing stage. In *Cabinet Mountains Wilderness*, however, the agency action at issue was limited

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[39] The dissent argues that *False Pass* is indistinguishable from this case because the "plan" adopted by the Secretary in that case is similar to the "plan" at issue here. *Dissent* at 1462-64. We could accept *False Pass* as controlling, however, only if we accept the dissent's premise that we may divorce *False Pass*'s regulatory scheme from the statute that gave it form and substance. *False Pass* certainly applies to this case by analogy, but the analogy ends where OCSLA begins. *False Pass* did not ignore OCSLA, nor should we in applying *False Pass*. We cannot accept the dissent's expansive reading of *False Pass* as establishing as the law of the circuit a general rule that applies to all ESA cases, not just ESA cases arising under OCSLA. *See id.* at 1463-64.

The dissent does not argue that the MLA establishes a segmented approach similar to OCSLA's, nor can it. *See supra* note 37. Instead, the dissent asserts that in *False Pass* we relied not only on the segmented approach of OCLSA but also on disclaimers which the Secretary had placed in the Final Notices of Sale and the Secretary's regulations, "only a portion of which had been promulgated under OCSLA." *Dissent* at 1464. However, the dissent's insistence that the "system" before us "will serve precisely the same function and have precisely the same effect as a practical matter" as the leasing plan approved in *False Pass* is not borne out by the facts of this case. *See Dissent* at 1464. First, the T & E stipulations do not guarantee that the FWS will examine leased land before surface-disturbing activities begin and do not expressly permit the Federal surface management agency to halt surface-disturbing activities once they have begun. *See supra* notes 32 & 33. Second, the dissent points to no regulations which provide for incremental-step consultation under the MLA or any other statute. In fact, as noted above, FWS regulations allow partial assessment of an agency action only when the action is statutorily segmented. *See supra* note 38.

to the Forest Service's approval of a four-year exploratory drilling proposal. In that case the FWS' biological opinion detailed the effects of the four-year program and thus considered the effect of the *entire* agency action. *Id.* at 680. The District of Columbia Circuit specifically emphasized that "our review of the agency's action is limited to approval of the four-year exploratory drilling proposal. . . . Any future proposals . . . to conduct drilling activities in the Cabinet Mountains area will require further scrutiny under . . . the ESA." *Id.* at 687. Hence *Cabinet Mountains Wilderness* does not support appellants' contention that the ESA is satisfied by a biological opinion which addresses only a portion of the agency action at issue.

We conclude that the ESA does not permit the incremental-step approach under the MLA advocated by appellants.[40] The biological opinions must be coextensive with

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[40] Our holding that appellants violated the ESA by failing to prepare comprehensive biological opinions despite the T & E stipulations is not inconsistent with our holding that the issuance of NSO leases does not constitute an irretrievable commitment of resources under NEPA. *See supra* pp. 1447-48. NEPA is a procedural statute designed merely to bring environmental concerns into the agency decision-making process. Because of the breadth of the environmental concerns that must be considered in an EIS, we do not interpret NEPA to require the federal agencies to fully evaluate all environmental impacts of leasing until the government has committed to activities beyond the mere sale of NSO leases. The ESA, on the other hand, contains the important substantive mandate that threatened and endangered species shall not be placed in jeopardy. We have noted in past comparison of NEPA and the ESA that the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a federal project is allowed to proceed without procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

the agency action and T & E stipulations cannot be substituted for comprehensive biological opinions.[41] We therefore hold in this case that before further leasing occurs in the Flathead and Gallatin National Forests and before any further surface-disturbing activities occur on the lands already leased, the FWS must prepare biological opinions assessing the potential impacts of all post-leasing activities.[42]

IV

THE RULE 19 ISSUES

[8] After judgment was entered below, a number of lessees attempted to intervene as necessary and indispensable parties. They also filed motions to vacate, reconsider, or amend the judgment, arguing that the district court had violated Fed.R.Civ.P. 19 and the due process clause of the Fifth Amendment by adjudicating their property interests without notice and an opportunity to be heard. In addition, they argued that the appellees' action was moot and barred by estoppel, laches, and the statute of limitations. In light of the lessees' delay in attempting to join litigation that had been filed two years earlier, the district court refused to reopen the judgment to consider the lessees'

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[41] Although agencies may include in their leasing programs additional safeguards which protect threatened and endangered species, such safeguards cannot substitute for an initial, comprehensive biological opinion. We do not address whether, once a comprehensive biological opinion is completed, the leasing agency can proceed with the agency action on the basis of lease stipulations which protect species.

[42] Our holding does not abrogate the agencies' duty of continued consultation since even the "comprehensive" biological opinions ordered here will rely on incomplete information as to the exact location, scope, and timing of future oil and gas activities. *See North Slope*, 642 F.2d at 610-11. When specific production information becomes available, the agencies will be able to make a more accurate assessment of the impact of various post-leasing activities.

arguments. The district court did, however, permit intervention for the purposes of appeal so that the lessees could press their arguments before this court.

The heart of the lessees' collateral arguments is their contention that all lessees were indispensable to the action below. They argue that without first joining the lessees, the district court should not have, "in equity and good conscience," proceeded to a judgment setting aside the agency actions allowing the issuance of oil and gas leases.[43] Appellees do not challenge the lessees' assertion that mineral leaseholders in the two forests would ordinarily be considered persons to be joined if joinder is feasible (necessary parties). [44] Rather they contend that their

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[43] Rule 19(b) provides the criteria by which we determine whether an action should be dismissed if necessary parties cannot be joined. It provides in full:

> If a person as described in subdivision (a)(1)-(2) hereof [necessary party] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed.R.Civ.P. 19(b).

[44] The lessees' claim that all lessees were necessary parties is merged on appeal into their argument that all lessees were indispensable parties. Even if, as the lessees assert, it would have been legally feasible to join all lessees below, that argument was not made to the district court until after it had entered judgment. Our review of the judgment below is limited to whether "in equity and good conscience" we can allow the judgment to stand. This is essentially an inquiry into whether the lessees were indispensable parties.

suit falls within the "public rights" exception to traditional joinder rules and that the lessees therefore are not indispensable parties.

The Supreme Court enunciated the public rights exception in *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), declaring, "In a proceeding . . . narrowly restricted to the protection and enforcement of *public rights*, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363, 60 S.Ct. at 577 (emphasis added). In *National Licorice*, the National Labor Relations Board (NLRB) had set aside, as a violation of the National Labor Relations Act (NLRA), contracts that the National Licorice Company had procured from its employees by means of unfair labor practices. *Id.* at 356, 60 S.Ct. at 573. The company challenged the authority of the NLRB to enter such an order in the absence of the employees, arguing in essence that they were indispensable because they were parties to the contracts.

The Supreme Court disagreed. Comparing the NLRB action to suits brought under the Sherman Act, the Court noted that antitrust injunctions often affect nonparties by preventing the offending company from meeting contractual obligations to others not before the court. *Id.* at 365, 60 S.Ct. at 578. Similarly, the Court reasoned, the Federal Trade Commission often enters orders restraining unfair methods of competition that preclude the offender from performance of outstanding contracts. In either case, "the public right [is] vindicated by restraining the unlawful actions of the defendant even though the restraint prevent[s] his performance of the contracts." *Id.* at 366, 60 S.Ct. at 578. The Court felt that this burden on the contractual rights of nonparties was acceptable, however, because such adjudications do not destroy the legal entitlements of the absent parties: "In every case the third persons were left free to assert such legal rights as they

might have acquired under their contracts." *Id.* at 366, 60 S.Ct. at 578.

In *National Licorice* itself, the public rights at stake were the policy objectives of the NLRA. To require joinder of employees covered by labor contracts obtained through unfair labor practices would effectively undermine the ability of the NLRB to enforce the NLRA.[45] Instead, the NLRB issued an order "directed solely to the employer" which was "ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal . . . ." *Id.* at 366, 60 S.Ct. at 578. Because the third parties' interest in the litigation was thus severable from the particular public rights at issue, the Supreme Court refused to burden the NLRB as the party seeking to enforce public policy with the requirement of joining the individual employees, even though their interests might be affected by the judgment.[46]

Subsequent courts have also refused to require the joinder of all parties affected by public rights litigation — even when those affected parties have property interests at stake — because of the tight constraints traditional

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[45] The lessees attempt to limit the application of *National Licorice* to cases in which it is impossible to join all necessary parties without destroying the jurisdiction of the forum to hear the case. We find no such limitation in the case law. Nor was there any suggestion in *National Licorice* itself that it would have been impossible to join all the employees.

[46] The fact that the absent employees in *National Licorice* actually benefitted from the NLRB's restriction on the enforcement of the labor contracts was irrelevant to the Court's holding. *See Pepsico, Inc. v. Federal Trade Commission*, 472 F.2d 179, 188-89 (2d Cir. 1972). Indeed, in two of the cases cited by *National Licorice*, as cases where the injunction validly interfered with the contract rights of absent parties, the absent parties were detrimentally affected by the court order. 309 U.S. at 365-66, 60 S.Ct. at 578 (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1938) and *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930)).

joinder rules would place on litigation against the government. *See, e.g., Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 927-29 (11th Cir. 1982) (Section 8 landlords not joined in action by tenants challenging lease termination procedure); *Swomley v. Watt*, 526 F.Supp. 1271, 1273 (D.D.C. 1981) (owners of use permit for federal lands not joined in Establishment Clause challenge to issuance of permit); *National Resources Defense Council v. Berklund*, 458 F.Supp. 925, 933 (D.D.C. 1978) (refusal to join applicants for preference right coal leases in NEPA challenge to lease sale), *affirmed*, 609 F.2d 553 (D.C. Cir. 1980); *National Resources Defense Council v. Tennessee Valley Authority* 340 F.Supp. 400, 407-08 (refusal to join coal producers in action challenging TVA's coal purchases under NEPA) (*NRDC v. TVA*); *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C. 1985) (mineral leaseholders not joined in challenge to lifting of protective restrictions on federal land).

Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420 (2d Cir. 1975), in particular, illustrates the potential danger of expanding joinder requirements in the public rights area. In that case, a class of black corrections officers challenged the constitutionality of a civil service examination used for the determination of promotions in the New York State Department of Corrections. Although 30.8% of the white officers taking the test passed, only 7.7% of the blacks also passed. *Id.* at 422. Midway through the trial, a group of white officers who had passed the examination attempted to intervene, arguing that they were indispensable parties. The district court permitted intervention but precluded the relitigation of matters already considered by the court. Upon conclusion of the trial, the court entered an order declaring the examination unconstitutional and enjoining the department from making appointments as a result thereof. On appeal, the Second Circuit admitted that because the district court injunction kept the intervenors from being promoted, these officers had an interest in the

litigation that was adversely affected. The court rejected the intervenors' argument that they were indispensable parties, however, citing to *National Licorice*. *Id.* at 424.[47] Clearly, to have found the intervenors indispensable in that situation would have sounded the death knell for any judicial review of executive decisionmaking.

Like the cases cited above, this case is amenable to the application of the *National Licorice* public rights doctrine.[48] The appellees' litigation against the government does not purport to adjudicate the rights of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA. The lessees argue strongly, however, that the public rights doctrine cannot apply here, since they claim that the district court destroyed their property rights in their absence by setting aside the leases.

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[47] The court also noted that the intervenors had been aware of the litigation and yet had delayed intervening until late in the trial below. *Id.* at 424. It is not clear to what extent this factor also influenced the court's decision that the white officers were not indispensable parties. Nonetheless, we note even more extensive delay in intervention in this case. Indeed, the lessees did not attempt to intervene in the action below until the case was determined against the government, two years after it was first filed.

[48] Although the district court did not expressly consider the public rights doctrine in rejecting the lessees' motion to reopen, we may affirm on any grounds for which there is support in the record. *See Lofton v. Heckler*, 781 F.2d 1390, 1392 (9th Cir.1986); *Seattle Times Co. v. Seattle Mailers' Union No. 32*, 664 F.2d 1366, 1369 n. 2 (9th Cir.1982).

As a factual matter, it is not clear that the district court actually intended to set aside the leases.[49] Nor do appellees urge such an interpretation of the order. They specifically note that "[t]he contracts themselves were not invalidated and further actions construing rights under them are not precluded by the district court's order." Brief for Plaintiff-Appellees at 36. Whether or not this is a correct interpretation of the district court's intent, we now clarify the order to assure that it has that effect.[50] As other courts also have done in similar situations, we hereby enjoin the federal defendants from permitting any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA and ESA. *See, e.g., Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986); *see also Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (injunction appropriate remedy for violation of NEPA) (citing cases). Moreover, any future environmental analysis by the federal agencies shall *not* take into consideration the commitments embodied in the non-NSO leases already sold.

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[49] As it stands, the order is open to the interpretation that the leases themselves have been set aside. The court wrote that "the agency actions allowing the issuance of the oil and gas leases on the Flathead and Gallatin National Forests are HEREBY SET ASIDE. The defendants are enjoined from further recommendations to lease and issuance of leases pending compliance with NEPA and ESA." Although the government moved for clarification of the order, the district court refused.

[50] On appeal, we may consider modifications to a judgment in order to avoid a "joinder stymie." *Provident Bank v. Patterson*, 390 U.S. 102, 111-12, 88 S.Ct. 733, 739, 19 L.Ed.2d 936 (1968) (as condition of affirmance, court of appeals may properly modify district court order to account for Rule 19 interests). By modifying the district court order in this case, we avoid the unnecessarily harsh result of completely divesting the lessees of their property rights.

The order as modified does not adjudicate or "prejudge" the rights of the lessees against the government.[51] *Cf. National Licorice*, 309 U.S. at 365, 60 S.Ct. at 578 (NLRB order "does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication."). We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government.[52] Thus, the public right to compliance with environmental standards is vindicated with a minimum imposition on the rights of lessees. The order as modified will obviously preclude immediate government

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[51] The lessees argue that in a case involving similar circumstances, leaseholders were found to be indispensable to the issuance of just such an order. *See Sierra Club v. Hathaway*, 579 F.2d 1162, 1166 (9th Cir. 1978). While it is true that the *Hathaway* court found that the lessees met the abstract criteria of indispensability, it also determined that, as decided, "the judgment appealed from does not in a practical sense prejudicially affect the interests of the absent parties." *Id.* For this reason, the court was able to affirm the judgment below without addressing whether the "public rights" doctrine would prevent the dismissal of an action where the lessees were otherwise indispensable parties. Therefore, *Hathaway* is not precedent on the question of the application of the public rights doctrine now before us.

The lessees' citation to *Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C.Cir. 1983), is also inapposite. In *Naartex*, plaintiff sued to cancel oil and gas leases that it alleged had been wrongfully issued to its competitors in the application lottery. Plaintiff claimed that it had been denied a lease because various other applicants had conspired to violate the lottery's one-application-per-person rule. Thus, the suit focused mainly on plaintiff's personal right to a lease against the allegedly wrongful actions of the absent defendants. *Naartex* was not a public rights case, nor did the court analyze it as such. *See id.* at 788-89.

[52] The lessees have also claimed that they were denied Fifth Amendment due process because they allegedly were not given notice and an opportunity to be heard below. Because the lessees' property interests were not adjudicated in this litigation, their right to notice and an opportunity to be heard cannot be invoked. *See Sierra Club v. Watt*, 608 F.Supp. 305, 325-28 (C.D.Cal. 1985).

approval of surface-disturbing activity, but such foreclosure of the lessees' ability to get "specific performance" until the government complies with NEPA and the ESA is insufficient to make the lessees indispensable to this litigation. *See NRDC v. TVA*, 340 F.Supp. at 408. By essentially creating NSO leases out of non-NSO leases, we retain in the leaseholders many of the fundamental attributes of their contracts. As strenuously argued by both the government and the lessees, significant economic value inheres in the exclusive right to engage in oil and gas activities, should any be allowed. Once the government complies with NEPA and the ESA, it is entirely possible that it will authorize surface-disturbing activities on many of the leased tracts. Thus, although development probably will be delayed, it is conceivable that it will occur on some of the leases already sold. The legally protected interests of the lessees are barely affected until the government decides that no development and production of the oil and gas reserves will be allowed, and even then they may have claims for damages against the government.

Finally, the lessees have robustly represented the interests of the entire lessee class on appeal. Although they are foreclosed from adding to the record on appeal, the evidence they have proffered is mainly cumulative of evidence already considered by the district court. For example, the lessees proffer evidence on the effectiveness of the mitigation stipulations in preventing environmental damage during post-leasing activities. There is, however, an abundance of evidence in the adminstrative record on the effectiveness of the mitigation stipulations, and the lessees offer nothing in their motions to intervene that would undermine our conclusion that the sale of leases without an NSO stipulation was a commitment of the land to development. The lessees also offer affidavits to show that they had no notice of the litigation until after judgment was entered, but that evidence was presented to the district court, which still found the lessees' delay in intervening inexcusable. Last, the lessees proffer evidence of

the specific damages they will suffer if they are forbidden from disturbing the land they have leased. As the nature of the damage is self-evident, details of specific injuries are unnecessary to our disposition.

As far as the substantive issues under NEPA and the ESA are concerned, we find that the absent lessees were adequately represented by the government below. The government vigorously defended its leasing decisions under both NEPA and the ESA, and the district court was not required to reopen the case only to rehash old evidence. *See Kirkland*, 520 F.2d at 423-24 (approving district court's decision to limit late intervention to matters not already litigated). The other claims raised by the lessees are meritless. Appellees were clearly diligent in prosecuting this litigation, so laches does not apply. *See Preservation Coalition v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982) (noting the "sparing" invocation of laches in environmental cases). To find appellees' claims moot, we would have to hold that no injunction can issue which affects the leases already issued; we have declined to so rule above. Similarly, we would only reach the statute of limitations and estoppel questions were we to hold, which we do not, that the lessees must be joined in this action.

CONCLUSION

The federal agencies violated NEPA by issuing non-NSO leases without preparing an EIS. They violated the ESA by making lease sales without preparing a biological opinion which considers the effects of post-leasing oil and gas activities. Accordingly, the agencies are enjoined from allowing any surface-disturbing activity on the lands already leased and from selling any more leases in the Flathead and Gallatin National Forests until they comply with NEPA and the ESA.

We hereby AFFIRM the judgment in part, REVERSE in part, and REMAND with instructions that the district

court determine which leases are NSO leases within the meaning of this opinion.

Costs are awarded to appellees.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

The factual and procedural description in part I is adequate for our decision and I concur in parts II and IV. I dissent from part III.

In part III, the majority concludes that the federal agencies involved here violated the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-43, when they leased national forest lands pursuant to a biological opinion which considered only the leasing stage itself. To reach this conclusion, the majority must attempt to distinguish our opinion in *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984) (*False Pass*). The majority's effort clearly fails. Because we are required to follow our own precedent, I dissent from the majority's holding in part III. *False Pass* controls this case and it mandates the result opposite to the one the majority reaches.

The majority cannot brush aside *False Pass*. In *False Pass*, we held that the Secretary of the Interior did not violate the ESA when he limited his biological opinion to the lease sale stage in offering leases under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-56. The majority attempts to distinguish *False Pass* on the grounds that *False Pass* involved leases under the OCSLA but the case before us does not. I can accept neither this attempt to distinguish *False Pass* nor the majority's contention that we should interpret *False Pass* to apply only to cases involving the OCSLA. An objective reading demonstrates that the determinative factor in *False Pass* was that the proposed plan of resource exploitation was segmented in such a way as to require agency approval prior to the commencement of each new stage of development. We stressed that the stages, as established by the OCSLA

were "separate and distinct" and would each involve separate review, *False Pass*, 733 F.2d at 608, and that the agency could put a halt to further developer action prior to each successive stage of the process, *id.* at 611. We held that the biological opinion therefore need only encompass the particular stage that the agency then contemplated approving because, in view of the segmented development scheme, "[t]he lease sale decision itself could not directly place [the endangered species] in jeopardy." *Id.* If any future stage of development turned out to pose a threat to the endangered species, then the segmented scheme provided a mechanism for the agency to put a stop to further development, and the ESA mandated that the agency employ this mechanism to do so. *Id.* at 608-12.

The development scheme contemplated in the leases in this appeal creates, as a practical matter, at least two similarly distinct stages. Notwithstanding the majority's contention in footnote 39, the leases contain a "Threatened and Endangered Species" stipulation that permits the agency to put *a complete stop* to any project *prior* to or after the commencement of any surface-disturbing activities if it finds that such activities would have a deleterious effect on an endangered species. *See* maj. op. at 1455 (quoting the stipulation). As a result of this stipulation, as the Fish & Wildlife Service observed, holders of leased tracts may still "have no opportunity for surface occupancy due to irresolvable conflicts with wildlife resources." Gallatin Biological Opinion, ER 400. In other words, all that the agency has done in selling the "leases" is conveyed priorities in submitting plans for development of these tracts; it has not obligated itself to approve any of these plans. As such, the leasing stage under the terms of the leases before us is as discrete a stage as that mandated by the OCSLA. *See Secretary of Interior v. California*, 464 U.S. 312, 339, 104 S.Ct. 656, 670, 78 L.Ed.2d 496 (1984).

The ESA still obligates the agency to perform appropriate biological studies before a leaseholder can engage in

any surface-disturbing activities at all on the tracts. As the majority reminds us, "[w]e cannot assume that government agencies will not comply" with the law. *See* maj. op. at 1448. Yet this position, which I also adopt, stands in stark contrast to the assumption apparently made by the majority that the agency will let the fact that the lessee expended substantial sums of money in preparing to exploit its lease pressure it into acting illegally by failing to live up to the mandate of the ESA. The lessees, after all, bear the potential risk of financial loss, as the terms of the leases obviously made them aware. The agency has irrevocably promised nothing beyond a right of first refusal.

Despite the existence of discrete stages, the majority seeks to argue that I am giving an "expansive reading" to *False Pass* and that *False Pass* does not control here because the application of that case is limited to cases involving leases under the OCSLA. Maj. op. at 1457 n. 39. The majority cites nothing from our *False Pass* opinion to support this proposition, and I find nothing that would lead me to believe it to be true. In fact, an objective reading would, I suggest, lead to an opposite conclusion. In *False Pass* it was the Secretary's "plan" for ensuring compliance with the ESA at each successive stage that we found "insure[d] that the many agency actions that may follow indirectly from the [lease] sale w[ould] not [place endangered species in jeopardy]." *False Pass*, 733 F.2d at 611. We did not say that it was the OCSLA that provided this insurance. In fact, in examining the "plan" involved in *False Pass*, we looked not only to the legal requirements of the OCSLA, but to two other elements as well: (1) the special disclaimers that the Secretary placed in the Final Notices of Sale to permit him to order cessation of exploratory drilling when it threatened the endangered whales, and (2) the Secretary's own relevant regulations, only a portion of which had been promulgated under the OCSLA. *Id.* at 611-12. I therefore cannot accept the majority's conclusion that it was the mere presence of the OCSLA, rather than the nature of the development plan it created, that

was determinative in *False Pass*. *See* maj. op. at 1456-57 & n. 39. What was determinative was the existence of a segmented plan and the statutory mandate of the ESA, which ensured that this plan would be properly implemented. Here, we have before us a system that will serve precisely the same function and have precisely the same effect as a practical matter, though it happens to derive from a different source. It seems clear to me that *False Pass* applies equally to any situation presenting a process of genuinely segmented development, as both the OCSLA and the leasing scheme here do. Our prior precedent, *False Pass*, should therefore control this case.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. MONTANA, GREAT FALLS DIVISION

No. CV-82-42-BU

JAMES R. CONNER; The Montana Wildlife Federation; the Madison-Gallatin Alliance,

Plaintiffs

v.

Robert BURFORD, in his official capacity as Director of the Bureau of Land Management; R. Max Peterson, in his official capacity as Chief Forester, United States Forest Service, Department of Agriculture; Erwin Steuke, in his official capacity as Area Manager, United States Fish and Wildlife Service, United States Department of the Interior; John R. Block, in his official capacity as Secretary of Agriculture, Department of Agriculture; Michael J. Penfold, in his official capacity as State Director of the United Staes Bureau of Land Management, State of Montana,

Defendants.

March 12, 1985

MEMORANDUM AND ORDER

HATFIELD, District Judge.

Before this court are motions for summary judgment by plaintiffs James R. Conner and the Montana Wildlife Federation and by defendants The Bureau of Land Management, the Forest Service, and others, involving the issuance of oil and gas leases of vast areas of the Flathead and Gallatin National Forests. Jurisdiction over this action is based on 28 U.S.C. § 1331.

Plaintiffs ask the court to declare unlawful the decisions by the Chief of the Forest Service, the Director of the Bureau of Land Management and the Secretary of the Interior to deny plaintiffs' protests and appeals against the issuance of oil and gas leases in the Flathead and the Gallatin National Forests. Plaintiffs contend that defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, by failing to prepare and consider environmental impact statements ("EIS") prior to making decisions which will significantly affect the environments of the forests in question. Further, plaintiffs claim violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, by defendants in failing to sufficiently consult with the United States Fish and Wildlife Service before taking such action. The court is asked to set aside the agency actions as being not in accordance with the above cited law under authority of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Additionally, plaintiffs ask the court to enjoin the issuance of any more leases until the agencies comply with NEPA and ESA.

The federal defendants assert they complied with NEPA and ESA by conducting environmental assessments ("EA's"), obtaining biological opinions, and establishing variously applied stipulations, including a No Surface Occupancy Stipulation ("NSO"), in the leases which render the environmental impact and the danger to threatened and endangered species at the leasing stage insignificant. Defendants assert that subsequent analysis and decision-making, based on individual proposals for further activity on the leases, will continue to uphold the mandates of NEPA and ESA.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

[1-3] The NEPA challenge requires the court to determine whether the federal defendants initiated a "major federal action significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). If the

defendants did initiate such an action, they are required to prepare and analyze an environmental impact statement before deciding what action should occur. *Id.* The standard of review of the decision to forego an EIS at the leasing stage is that of reasonableness. *Foundation for North American Wild Sheep v. U.S.*, 681 F.2d 1172 (9th Cir.1982). This court finds that the decision to forego an EIS was unreasonable. The EIS should serve to assist agencies in making decisions before any significant steps are taken which may damage the environment.

> A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. (citations omitted.) That purpose requires that the NEPA process be integrated with agency planning at the 'earliest possible time,' 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.

Thomas v. Peterson, 753 F.2d 754, 757 (9th Cir.1985).

In this case, the leasing stage is the first stage of a number of successive steps which clearly meet the "significant effect" criterion to trigger an EIS.

Leases without NSO stipulations have been set aside for lack of NEPA compliance because they fail to ensure that environmentally damaging activity can be precluded by the federal agency. *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C.Cir.1983). This ruling clearly extends to leases which allow surface occupancy on any part of the leased acreage.

This court must therefore consider the reasonableness of leasing lands which have an NSO stipulation covering the entire area of the lease. To use the NSO stipulation as a mechanism to avoid an EIS when issuing numerous leases on potential wilderness areas circumvents the spirit of

NEPA. Subsequent site-specific analysis, prompted by a proposal from a lessee of one tract, may result in a finding of no significant environmental impact. Obviously, a comprehensive analysis of cumulative impacts of several oil and gas development activities must be done before any single activity can proceed. Otherwise, a piecemeal invasion of the forests would occur, followed by the realization of a significant and irreversible impact. *See e.g., Cady v. Morton*, 527 F.2d 786 (9th Cir.1975); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir.1974); 40 C.F.R. § 1508.-27(b)(7).

The issuance of a lease with an NSO stipulation does not guarantee an EIS before any development would occur. In fact, NSO stipulations can be modified or removed without an EIS. Gallatin Environmental Analysis, page 3 (discussing re-evaluation of NSO stipulations in the Crazy Mountains roadless area). This court is compelled to set aside the decisions of defendants to lease without preparation of an EIS. The idea of possible site specific assessments in the future does not comply with the objective of protecting the area for possible wilderness designation.

> . . . the promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development.

California v. Block, 690 F.2d 753 at 762-763 (9th Cir.1982).

II. ENDANGERED SPECIES ACT

The second issue before the court involves federal agency compliance with the provisions of the Endangered Species Act ("ESA"). 16 U.S.C. §§ 1531 *et seq.* (1976).

[4] Plaintiffs challenge the sufficiency of the biological opinions, prepared by the Fish and Wildlife Service as mandated by Section 1536(b) of ESA. The court finds federal defendants' compliance with ESA to be analogous to their compliance with NEPA. The biological opinions

examine the effects of oil and gas activity only so far as the leasing stage, asserting lack of information to project consequences of further development. Here again, the defendants rely on stipulations to protect the threatened and endangered species when subsequent intrusion into the critical habitats occurs. The potential for a piecemeal invasion of habitat is present when the agency is allowed to lease without a comprehensive analysis of all stages of oil and gas development. *See, North Slope Borough v. Andrus*, 642 F.2d 589 (D.C.Cir.1980). The environmental assessments of both the Flathead and the Gallatin warn that this piecemeal approach could lead to " . . . a chipping away and deterioration of important habitat . . . ." Flathead EA p. 109-6, Gallatin EA App. D p. 7.

The mandate of the Endangered Species Act is to obtain a comprehensive Biological Opinion designed to conserve endangered life and threatened species and their ecosystems. 16 U.S.C. § 1531. Essentially, the defendants' purpose here was to expeditiously issue oil and gas leases.

III. CONCLUSION

The federal agencies violated the procedural requirements of NEPA by failing to prepare an EIS on the effects of oil and gas activity on the Flathead and Gallatin National Forests. Additionally, they violated ESA by failing to analyze the consequences of all stages of oil and gas activity on the forests.

Therefore, under the provisions of 5 U.S.C. § 706, the agency actions allowing the issuance of the oil and gas leases on the Flathead and Gallatin National Forests are HEREBY SET ASIDE. The defendants are enjoined from further recommendations to lease and issuance of leases pending compliance with NEPA and ESA.

Plaintiffs' motion for summary judgment is GRANTED.

Defendants' motion for summary judgment is DENIED.

Parties shall bear their own costs.

APPENDIX C

THE MINERAL LEASING ACT

30 U.S.C. § 226 (Supp. V 1987):

(a) Authority of Secretary

All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

(b) Lands within known geologic structure of a producing oil or gas field; lands within special tar sand areas; competitive bidding; royalties

(1)(A) All lands to be leased which are not subject to leasing under paragraph (2) of this subsection shall be leased as provided in this paragraph to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than 2,560 acres, except in Alaska, where units shall be not more than 5,760 acres. Such units shall be as nearly compact as possible. Lease sales shall be conducted by oral bidding. Lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary. A lease shall bc conditioned upon the payment of a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease. The Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. Leases shall be issued within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year. All bids for less than the national minimum acceptable bid shall be rejected. Lands for which no

bids are received or for which the highest bid is less than the national minimum acceptable bid shall be offered promptly within 30 days for leasing under subsection (c) of this section and shall remain available for leasing for a period of 2 years after the competitive lease sale.

(B) The national minimum acceptable bid shall be $2 per acre for a period of 2 years from December 22, 1987. Thereafter, the Secretary may establish by regulation a higher national minimum acceptable bid for all leases based upon a finding that such action is necessary: (i) to enhance financial returns to the United States; and (ii) to promote more efficient management of oil and gas resources on Federal lands. Ninety days before the Secretary makes any change in the national minimum acceptable bid, the Secretary shall notify the Committee on Interior and Insular Affairs of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. The proposal or promulgation of any regulation to establish a national minimum acceptable bid shall not be considered a major Federal action subject to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969.

(2) If the lands to be leased are within a special tar sand area, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than five thousand one hundred and twenty acres, which shall be as nearly compact as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary. Royalty shall be 12½ per centum in amount or value of production removed or sold from the lease, subject to subsection (k)(1)(c)[1] of this section. The Secretary may lease such additional lands in special

tar sand areas as may be required in support of any operations necessary for the recovery of tar sands.

(c) Lands subject to leasing under subsection (b); first qualified applicant

(1) If the lands to be leased are not leased under subsection (b)(1) of this section or are not subject to competitive leasing under subsection (b)(2) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding, upon payment of a non-refundable application fee of at least $75. A lease under this subsection shall be conditioned upon the payment of a royalty at a rate of 12.5 percent in amount or value of the production removed or sold from the lease. Leases shall be issued within 60 days of the date on which the Secretary identifies the first responsible qualified applicant.

(2)(A) Lands (i) which were posted for sale under subsection (b)(1) of this section but for which no bids were received or for which the highest bid was less than the national minimum acceptable bid and (ii) for which, at the end of the period referred to in subsection (b)(1) of this section no lease has been issued and no lease application is pending under paragraph (1) of this subsection, shall again be available for leasing only in accordance with subsection (b)(1) of this section.

(B) The land in any lease which is issued under paragraph (1) of this subsection or under subsection (b)(1) of this section which lease terminates, expires, is cancelled or is relinquished shall again be available for leasing only in accordance with subsection (b)(1) of this section.

* * *

(f) Notice of proposed action; posting of notice; terms and maps

At least 45 days before offering lands for lease under this section, and at least 30 days before approving applications for permits to drill under the provisions of a lease or substantially modifying the terms of any lease issued under this section, the Secretary shall provide notice of the proposed action. Such notice shall be posted in the appropriate local office of the leasing and land management agencies. Such notice shall include the terms or modified lease terms and maps or a narrative description of the affected lands. Where the inclusion of maps in such notice is not practicable, maps of the affected lands shall be made available to the public for review. Such maps shall show the location of all tracts to be leased, and of all leases already issued in the general area. The requirements of this subsection are in addition to any public notice required by other law.

THE NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S.C. § 4332:

> (2)(c) The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —
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> • • •
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and

enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . . .

THE ENDANGERED SPECIES ACT

16 U.S.C. § 1536:

(a)(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * *

(b)(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

* * *

(c)(1) **Biological assessment.** (1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to

any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978 [enacted Nov. 10, 1978], request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-2000

PARK COUNTY RESOURCE COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,
Defendants-Appellees,

and

Marathon Oil Company, et al.,
Defendants-Intervenors/Appellees,

Mountain States Legal Foundation,
Amicus Curiae.

April 17, 1987

Before McKAY, SEYMOUR and TACHA, Circuit Judges.

McKAY, Circuit Judge.

Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982 & Supp. III 1985) (NEPA), requires that all federal agencies prepare a detailed environmental impact statement (EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The plaintiffs in this suit contend that the

Bureau of Land Management (BLM) unlawfully issued an oil and gas lease, and thereafter unlawfully approved an Application for Permit to Drill (APD) filed by the Marathon Oil Company, in contravention of both NEPA and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982 & Supp. III 1985) (ESA). They appeal the district court's denial of a preliminary injunction enjoining the issuance of the permit to drill as well as its dismissal of their suit with prejudice.

I. Facts

In 1979, the Forest Service prepared an extensive environmental assessment (EA) exceeding 100 pages and addressing issuance of federal oil and gas leases in the Shoshone and other forests in the Rocky Mountain Region. Record, vol. 8, exhibit C. The EA explores various leasing alternatives, including issuance of leases without stipulations, issuance of leases with stipulations, and issuance of no leases. It examines the potential effects of each of these alternatives on energy use and conservation, on national forest administration, and, as its name indicates, on the environment. It concludes that "[o]il and gas lease issuance, as such, creates no environmental impacts. The imposition of appropriate stipulatory controls for operations subsequent to lease issuance can, in most cases, prevent or satisfactorily mitigate unacceptable environmental impacts." *Id.* at 14. Consequently, the Forest Service's announced preferred alternative is to recommend lease issuance with appropriate stipulations. *Id.* The EA specifically notes that prior to any drilling activity, the need for a site-specific, much more comprehensive EIS must be examined. *Id.* at app. sec. III.

On November 9, 1979, the Regional Forester issued a Finding of No Significant Impact (FONSI) with respect to lease issuance. The FONSI indicated that issuance of oil and gas leases would have no significant impact on the human environment, meaning that the preparation of an

EIS pursuant to NEPA would not be necessary at this stage.

On November 5, 1980, May Petroleum, Inc., filed with BLM an oil and gas lease offer which encompassed 10,174 acres of non-wilderness, multiple-use land[1] in the Shoshone National Forest. As is routine with such offers, BLM requested the Forest Service to advise whether the lease should issue, and, if so, to recommend appropriate stipulations to protect the environment. The Regional Forester recommended lease issuance, and BLM issued the lease on July 9, 1982, with an effective date of August 1, 1982.

The lease contained a number of provisions and stipulations providing for environmental resource and safety protections. It required the lessee to take all reasonable steps to prevent unnecessary soil erosion or timber damage, unnecessary air and water pollution, and unnecessary damage of surface improvements, fossils or artifacts and to restore the land surface to its former condition after use is terminated. Lease, section 2(q), record, vol. 6, exhibit 21, at 91; Lease, Stipulation for Lands Under Jurisdiction of Department of Agriculture, *id.* at 93. It also required prior approval, as well as the preparation of further EAs, before any surface-disturbing actions, such as drilling. Lease, Surface Disturbance Stipulations, *id.* at 93-94. Also prior to undertaking any ground disturbance activities, the lands had to be surveyed for any endangered or threatened plant or animal species, and a report thereon filed, possibly resulting in use restrictions or even

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[1] The lease area has never been designated a wilderness, wilderness study, park, or other restricted-use area. The district court noted:

> Congress has had three chances in recent years to incorporate these lands into a Wilderness Area, but each time has refused to do so, including in 1984 when the lands in question were once again classified as multiple-use areas in the Wyoming Wilderness Act. . . .[M]ultiple-use does include oil and gas drilling.

Park County Resource Council, Inc. v. United States Dep't of Agric., 613 F.Supp. 1182, 1187 (D.Wyo. 1985).

complete use prohibition. *Id.* at 94. Finally, the lease restricted use of certain areas during specified time periods of the year for the protection of big game habitat, as well as for the preservation of the land's recreational use. Lease, Limited Surface Use Stipulation, *id.* at 94.

On June 21, 1983, Marathon Oil, the lessee's operator, submitted an APD in order to drill an exploratory well (North Fork Well) in the leased area. BLM announced in August of 1983 that it, in conjunction with the Forest Service, would prepare an EIS with respect to the drilling application.

The study area consisted of approximately 39,000 acres, extending well beyond the 2.5 acre well area and even the 10,000 acre lease area. The exhaustive process spanned more than a year, employed numerous environmental specialists,[2] and involved both a preliminary and a final draft, the latter 160-page document incorporating considerations and suggestions received during the public comment period and from other government agencies. Pursuant to ESA, BLM also conducted a Biological Assessment which evaluated the proposed action on threatened and endangered animal species, including the grizzly bear, peregrine falcon, bald eagle, and gray wolf. In this regard, the United States Fish and Wildlife Service was consulted.

Although evaluating several alternatives, the final EIS recommended allowing the drilling of the North Fork Well, and permitting water transport to the site through a temporary pipeline, but restricting access to the drill site to helicopter access only, as opposed to temporary roads. It concluded that this proposal best permitted a valid test

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[2] An interdisciplinary team of experts examined Marathon Oil's proposal and prepared the draft and final EISs. The team included several hydrologists, a soil scientist, several wildlife biologists, a geologist, a transportation planner, two landscape architects, a botanist, a physical scientist, an environmental scientist, an environmental coordinator, and two sociologists. *See* Draft EIS, record, vol. 8, exhibit A, at 61; Final EIS, record, vol. 8, exhibit B, at 63-64.

for oil and gas potential while minimizing adverse environmental impacts. On May 9, 1985, the BLM district manager issued a record of decision approving the APD on the condition that several additional mitigation measures to protect the environment be imposed. Record of Decision for APD, record, vol. 6, exhibit 24.

The record and briefs on appeal extensively explore the procedural adequacy of the EIS and the Biological Assessment. However, in light of our disposition of that issue, *see infra* section III, we need not recount such evidence here.

II. Procedural History

On May 31, 1985, plaintiffs appealed the APD approval to the Interior Board of Land Appeals (IBLA). On June 3, 1985, before IBLA rendered its decision, plaintiffs filed this action requesting an injunction prohibiting oil exploration and drilling at the North Fork Well and all future sites until the Government complied with NEPA by preparing an adequate EIS. They also challenged for the first time the underlying 1982 lease issuance and requested a declaratory judgment stating "that the issuance of a lease which may be used to drill for oil and establish a wildcat well on National Forest Service Lands constitutes a major federal action which significantly affects the quality of the human environment, and thereby requires the preparation of an EIS." Complaint, record, vol. 1, at 10. They also prayed for an order "requiring defendants to withdraw their approval on any leases or permits previously given pending their compliance with the provisions and requirements of NEPA." *Id.* at 11.

Thereafter, plaintiffs filed an application for a temporary restraining order and for a preliminary injunction. The district court denied the TRO after an evidentiary hearing. With the consent of all parties, the court consolidated the preliminary injunction hearing with the trial on the merits, at which eleven witnesses testified. At the conclusion of the proceedings, the court orally denied the

preliminary injunction and dismissed plaintiffs' complaint with prejudice. A written opinion was issued shortly thereafter. *See Park County Resource Council, Inc. v. United States Dep't of Agric.*, 613 F. Supp. 1182 (D. Wyo. 1985).

The district court barred as untimely the claim that an EIS, rather than an EA, was required prior to the lease issuance itself, citing the ninety-day statute of limitations contained in the Mineral Lands Leasing Act, 30 U.S.C. § 226-2 (1982). Alternatively, the court found the claim to be barred by the equitable defense of laches, as well as by failure to exhaust administrative remedies. In an abundance of caution, however, the court further held that even if the challenge of the FONSI with respect to the lease issuance was not barred, the claim failed on the merits.

As to the second NEPA claim regarding the APD approval, the court found that plaintiffs failed to demonstrate any procedural inadequacy in the EIS for the North Fork Well drilling. Moreover, it found that the agencies' actions pursuant to ESA were not arbitrary and capricious. While admitting sympathy for plaintiffs' concerns about the environment, the court concluded that

> ail [plaintiffs] have proven is that a "no action" alternative would better suit their wishes, vocations, or lifestyles. None of the eight witnesses called by plaintiffs and none of the affiants, whose affidavits plaintiffs presented, identified any real factual objection to the documents prepared by the federal defendants prior to rendering their decisions on the lease and APD. . . . To the contrary, as admitted by a number of plaintiffs' witnesses, plaintiffs' quarrel is with the decision to permit exploration activities on the lease, not the administrative record on which the decisions objected to are based.

Park County Resource Council, Inc., 613 F. Supp. at 1188-89.

Plaintiffs unsuccessfully sought, both from this court and the Supreme Court, a stay of the drilling activities pending appeal. Since the district court's judgment was rendered, drilling of the North Fork Well has been completed, resulting in a dry hole. Reclamation work at the site has also been completed and is now being monitored.

III. APD Challenge

Plaintiffs' challenge of the APD approval based on the allegedly inadequate EIS and their appeal of the denial of a preliminary injunction prohibiting drilling at the North Fork site until a more thorough EIS is prepared must be dismissed as moot.

[1,2] To satisfy the article III case-or-controversy prerequisite for federal court jurisdiction, the litigant must have suffered actual injury that can be redressed by favorable judicial decision. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70, 104 S. Ct. 373, 374, 78 L.Ed.2d 58 (1983) (per curiam); *Blinder, Robinson & Co. v. SEC*, 748 F.2d 1415, 1418 (10th Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2655, 86 L.Ed.2d 272 (1985). The redressability arm of the case-or-controversy requirement is not satisifed here. Drilling at the well site has been abandoned, and reclamation work has now been completed. Reversal of the district court's denial of a preliminary injunction prohibiting drilling would now be no more than an empty gesture. No resolution of this portion of plaintiffs' dispute can redress their grievance concerning the APD approval pursuant to an allegedly insufficient EIS. That redressability was possible when the suit was initiated does not cure the jurisdictional defect on appeal, for "a court can determine the merits of a controversy only if jurisdiction exists at all stages of the proceeding." *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981).

In addressing the mootness issue, plaintiffs state that "[a]lthough there is no present need for injunctive relief because the subject 'wildcat' oil well has already been drilled and was dry, appellants believe that the issues presented in this brief are of great public importance and require consideration by this Honorable Court." Appellants' Opening Brief at 5-6. They further contend that "[t]he fact that the well has been drilled does not cure the legal issues raised by this appeal. Appellants feel very strongly that this Honorable Court should reverse the decision of the lower court." *Id.* at 33.

[3] That they "feel very strongly" that we should address the merits of this issue and reverse the district court is not helpful. "Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot." *Ashcroft v. Mattis*, 431 U.S. 171, 173, 97 S.Ct. 1739, 1740, 52 L.Ed.2d 219 (1977) (per curiam). Moreover, that we fail to "cure the legal issues" when we dismiss this claim is also of no moment. In every case dismissed as moot, legal questions are necessarily left unresolved. When the underlying facts illuminating the legal issue no longer exist, we would be doing nothing more than rendering an advisory opinion as to an abstract question of law were we to retain jurisdiction. Such is not within our purview under article III. Merely because an issue may be "of great public importance" does not vest this court with the power to *address* the complaint, absent the concomitant ability to *redress* it. *See Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 941-42 (5th Cir. 1982); *City of Romulus v. County of Wayne* , 634 F.2d 347, 348-49 (6th Cir. 1980); *Florida Wildlife Fed'n v. Goldschmidt*, 611 F.2d 547, 549 (5th Cir. 1980); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1378-79 (9th Cir. 1978); *Ogunquit Village Corp. v. Davis*, 553 F.2d 243, 246-47 (1st cir.1977) (NEPA challenges all considered moot where activity or project completed or nearly completed at time of appeal).

IV. Lease Issuance Challenge

Plaintiffs' challenge to the validity of the 1982 lease issuance, unlike their challenge to the APD, has not been mooted by Marathon Oil's abandonment of the North Fork Well site. The lease remains extant, and, under its authority, Marathon Oil has represented that it "may in the future seek approval from federal defendants to drill an additional well in the North Fork Well Area." Intervenors' Answer Brief at 15. The suit dismissed by the district court prayed for a declaratory judgment that the issuance of an oil and gas lease on National Forest Service Lands requires the preparation of an EIS pursuant to NEPA and also asked the court to order the defendants to withdraw their approval to the lease in question pending compliance with NEPA. *See supra* section II. Reversal of the district court's dismissal would result in redress of plaintiffs' grievance. Moreover, since the lease remains operative at present, issuance of the requested declaratory judgment and order would not constitute "an advisory opinion upon a hypothetical basis, but . . . an adjudication of present right upon established facts." *Ashcroft*, 431 U.S. at 172, 97 S.Ct. at 1740 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)).

A.

Prior to addressing the merits of plaintiffs' challenge, the district court held that plaintiffs were barred on three distinct grounds from maintaining their cause of action. Thus, we must first address these three bases before reaching the merits.

[4] First, the district court ruled that the present action was time-barred under the ninety-day statute of limitations found in the Mineral Lands Leasing Act, 30 U.S.C. § 226-2 (1982) (MLLA). That statute provides: "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is

commenced or taken within ninety days after the final decision of the Secretary relating to such matter." *Id.* While the subject lease was issued in 1982, suit was not instituted until 1985. No other court has addressed the issue of whether the MLLA statute of limitations applies to NEPA challenges that happen to involve an oil and gas lease. We disagree with the trial court and hold that this statute is inapplicable in such cases.

The thrust of our reasoning parallels that of the Ninth Circuit in *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986). In that case, plaintiffs challenged the issuance by the National Marine Fisheries Service (Service) of a permit that authorized Sea World to capture killer whales. The plaintiffs alleged that the Service's issuance of the permit without prior preparation of an EIS violated NEPA. The general act prescribing the procedure for issuance of such permits is the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1982) (MMPA).

The Ninth Circuit rejected Sea World's claim that plaintiffs' challenge, brought six months after the permit's issuance, was time-barred by the sixty-day statute of limitations found in the MMPA itself for "judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit." 16 U.S.C. § 1374(d)(6). The court found that, rather than disputing the *substantive* "terms and conditions" of the permit, plaintiffs were challenging the *procedural* failure to comply with NEPA. While recognizing that a NEPA procedural challenge can indirectly implicate some terms and conditions — even the validity — of the permit, the court held that plaintiffs' challenge was essentially procedural in character and thus not controlled by the statute of limitations found in the MMPA.

Similarly, the MLLA statute of limitations at issue here applies only to actions contesting either the lease issuance or substantive decisions relating to the lease itself. It applies in cases challenging lack of compliance with all the

intricate requirements of Subchapter IV of the MLLA which deals with oil and gas leasing. The present action is not one "contesting decisions of the Secretary of the Interior *under the Mineral Leasing Act.*" H.R.Rep. No. 2135, 86th Cong., 2d Sess. 14 (1960), U.S.Code Cong. & Admin.News 1960, pp. 3313, 3337 (emphasis added). It is an action contesting a decision *under NEPA*, challenging defendants' decision to forego preparation of an EIS that plaintiffs contend is statutorily mandated.

The standards applicable to any effort to enforce NEPA should apply here. Otherwise, the singular NEPA claim — that a contemplated federal action is a "major" one "significantly affecting the quality of the human environment," thus requiring preparation of an EIS under NEPA — would be time-barred at any number of times, depending upon which statute the underlying agency action is based. A NEPA challenge to a permit issued under the MMPA would be barred at sixty days, while that same NEPA challenge would be barred at ninety days if it happened to involve an oil and gas lease. Still other identical NEPA claims could technically remain alive for decades if the challenged federal action was not subject to a statute of limitations.

We decline to impute to Congress the intention that such an arbitrary and inconsistent approach to NEPA claims should prevail. The mere happenstance that the present NEPA action involves an oil and gas lease does not remove it from general NEPA principles regarding the timeliness of suit and has no bearing on NEPA enforcement. A contrary holding would be no more than a blind application of a statute of limitations in a context in which its application was not envisioned and would result in illogical and capricious administration of an important environmental statute. Therefore, we hold that a NEPA challenge to the issuance of an oil and gas lease on federal forest land without prior preparation of an EIS is not subject to the ninety-day statute of limitations found in the MLLA.

NEPA itself does not contain a statute of limitations. Thus, timeliness challenges to NEPA actions have routinely involved analysis under the doctrine of laches. The district court in this case invoked this doctrine as the second ground for holding this action barred.

[5] An environmental action may be barred by the equitable defense of laches if (1) there has been unreasonable delay in bringing suit, and (2) the party asserting the defense has been prejudiced by the delay. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982). The district court found that plaintiffs were aware of the lease issuance without preparation of an EIS no later than the fall of 1983 and that their delay in filing suit until May of 1985 was unreasonable. It also found that the approximately $1 million spent on both EIS preparation and other preparatory measures for the North Fork Well drilling constituted sufficient prejudice to warrant application of the bar of laches. Plaintiffs now claim that their decision to wait until BLM acted on the APD to challenge issuance of the lease should not be subject to laches.

Nearly every circuit, including this one, and numerous district courts have recognized the salutary principle that "[l]aches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress's environmental policy." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982); *see also Jicarilla Apache Tribe*, 687 F.2d at 1337-38; *Concerned Citizens on I-190 v. Secretary of Transp.*, 641 F.2d 1, 7-8 (1st Cir. 1981); *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779-80 (9th Cir. 1980); *Save Our Wetlands, Inc. v. United States Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977); *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 977 (2d Cir. 1976); *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1324 (8th

Cir. 1974); *Environmental Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164, 1182-83 (6th Cir. 1972); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1329-30 (4th Cir.), *cert. denied*, 409 U.S. 1000, 93 S.Ct. 312, 34 L.Ed.2d 261 (1972); *Watersheds Assocs. Rescue v. Alexander*, 586 F.Supp. 978, 984 (D.Neb.1982); *Citizens Comm. Against Interstate Route 675 v. Lewis*, 542 F.Supp. 496, 526 (S.D.Ohio 1982); *Dalsis v. Hills*, 424 F.Supp. 784, 789 (W.D.N.Y. 1976); *Save Our Wetlands, Inc. v. Rush*, 424 F.Supp. 354, 355 (E.D.La. 1976).

[6,7] The application of laches involves a discretionary decision of the district court. *Jicarilla Apache Tribe*, 687 F.2d at 1338. Thus, we review to determine whether the district court has abused its discretion in invoking the doctrine of laches. In environmental litigation one measure of abuse of discretion is whether the district court recognized that laches must be invoked sparingly in order to facilitate Congress's environmental policy. The opinion of the district court in this case fails to consider the legal standard disfavoring laches. This failure amounts to an abuse of discretion. The application of laches involves a discretionary decision of the district court, but that discretion is confined by established standards. Although failure to apply the correct legal standard could be the basis for remand to the district court, we have found that remand is not necessary where there is no dispute regarding the underlying facts and where it is in the interest of judicial economy and efficiency to decide a matter. *See Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 923 n. 2 (10th Cir. 1986). The parties to this dispute disagree only as to the proper characterization of the plaintiffs' activities prior to the institution of this suit. Further, our disposition of the other issues in this appeal renders it unnecessary for us to rely on the laches issue.

This court has held that the "[m]ere lapse of time does not amount to laches." *Jicarilla Apache Tribe*, 687 F.2d at

1338 (citation omitted). The delay must be "unreasonable." The district court found plaintiffs' delay to be unreasonable, because they "were so convinced that the APD would never be granted that they decided to sit on the lease EIS issue until after the decision on the APD." *Park County Resource Council, Inc.*, 613 F.Supp. at 1186.

[8] We do not perceive the sinister motive or dilatory tactics apparently seen by the district court in plaintiffs' conscious decision to initially concentrate their energies and resources on participating in the EIS preparation for the North Fork Well drilling, believing APD approval would be unlikely based on their view that the EIS was inadequate. Their tactical decision to fight the APD rather than the lease issuance, because it appeared to be the most efficient way to press their substantive objectives, standing alone, raises no implication of bad faith. The general public, whose interests plaintiffs essentially represent in environmental cases, should not be penalized for plaintiffs' decision to pursue the avenue that they thought to be most fruitful in vindicating their concerns.

"The defense of laches is bottomed on the principle that equity aids the vigilant, not those who sleep on their rights." *Dalsis*, 424 F.Supp. at 788. The nearly two-year delay in challenging the lease issuance in this case was not due to a lack of vigilance; rather, plaintiffs expected that their strategic decision to focus on the APD approval would render challenge to the underlying lease issuance superfluous. Their strategy proved to be ill-destined, but we should not chastise their efforts to selectively minimize litigation. Otherwise, we discourage such thoughtful preparation and encourage rote litigation at the time of every agency action, even though successful challenge of only one action in the series would result in obtaining the benefits sought.

We also fail to agree that the prejudice prong was sufficiently satisfied. The $1 million expense cited by the district court as constituting adequate prejudice relates

primarily to preparation of the EIS for APD approval as well as other drilling expenditures — costs that would have been incurred whether the district court ordered preparation of an additional EIS with respect to the lease issuance itself or not. Any increased costs from delay in drilling while an EIS is being prepared on the lease issuance is not sufficient to establish prejudice, because NEPA contemplates just such a delay. *Preservation Coalition, Inc.*, 667 F.2d at 855; *Coalition for Canyon Preservation*, 632 F.2d at 780.

Furthermore, even if pertinent, the expenditures here may not satisfy the prejudice test. Although $1 million seems to most an exorbitant amount, such expenditure has been held insufficient to establish prejudice. *See id.; Watershed Assocs. Rescue*, 586 F.Supp. at 985-86. Rather than absolute dollars already spent, the more salient inquiry explores what percentage of total costs has already been committed. The record is completely void of any such projection.

Moreover, and more important, this is not a case where the project is so substantially completed that significant environmental effects are irreversible, even if an EIS would now be ordered on the lease issuance. *See id.* at 986. We assume that reclamation of the North Fork Well site has mitigated any substantial environmental effects thus far proceeding from the lease issuance. Further drilling under the lease has not yet transpired. In most of the cases in which laches has been applied in the NEPA context, the project allegedly significantly affecting the quality of the human environment was nearly completed, rendering preparation of an EIS redundant. *See, e.g., Ogunquit Village Corp.*, 553 F.2d at 245 (project completed); *Save Our Wetlands, Inc.*, 549 F.2d at 1028 ($26 million expended and large portions of project substantially completed); *Shiffler v. Schlesinger*, 548 F.2d 96, 104 (3d Cir.1977) (project 85 to 90% complete and irreversible commitment of secondary resources found); *Township of Parsippany-*

Troy Hills v. Costle, 503 F.Supp. 314, 320 (D.N.J.1979) (project 80% completed), *aff'd*, 639 F.2d 776 (3d Cir. 1980); *Michigan v. City of Allen Park*, 501 F.Supp. 1007, 1017 (E.D.Mich. 1980) (project 80% completed), *aff'd*, 667 F.2d 1028 (6th Cir.1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 443 (1982). Furthermore, even substantial completion has not barred some suits. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 670 n. 11, 677-78 (9th Cir.1975) (project 50% completed, yet laches held inapplicable). While technically the "federal action" we are examining — lease issuance — is completed in this case, preparation of an EIS at this point in time could still reasonably be expected to ameliorate any feared environmental harm emanating from the lease issuance. For example, additional and more tailored lease stipulations might be devised in light of the more probing information found in an EIS as opposed to an EA.

In short, having concluded there is neither unreasonable delay nor sufficient prejudice, we hold that the defense of laches does not bar plaintiffs' claim contesting the lease issuance without preparation of an EIS.

[9] Finally, the district court held the present action barred for failure to exhaust administrative remedies. Plaintiffs did not, as they may have if they so chose, appeal the lease issuance to the Interior Board of Land Appeals within thirty days under 43 C.F.R. §§ 4.410-.411 (1986). Whether to apply the exhaustion doctrine is a matter within the trial court's discretion. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 743 n. 12 (10th Cir. 1982), but we hold that the trial court abused its discretion in applying the doctrine on the present facts.

[10] In *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969), the Supreme Court articulated several rationales supporting the exhaustion doctrine, including (1) avoidance of premature interruption

of the administrative process, (2) deference to bodies possessing expertise in areas outside the conventional experience of judges, (3) recognition of executive and administrative autonomy, and (4) development of a factual record. *Id.* at 193-94, 89 S.Ct. at 1662-63. When these interests would not be promoted by application of the exhaustion doctrine, it is error to indiscriminately dismiss in its name. "The doctrine of exhaustion of administrative remedies has some flexibility depending on the circumstances." *Jette v. Bergland*, 579 F.2d 59, 62 (10th Cir. 1978) (district court's dismissal of NEPA claim under exhaustion doctrine that EIS should have been prepared prior to Exxon's exploration for copper deposits reversed); *see also City of Irving v. FAA*, 539 F.Supp. 17, 34 (N.D.Tex.1981) (challenge to failure of agency to furnish EIS not subject to dismissal on ground of failure to exhaust administrative remedies).

[11] Dismissal here did not avoid *interruption* of the administrative process; there was no administrative process available to plaintiffs at the time of dismissal. Exhaustion doctrine presupposes an adequate administrative remedy. Neither the IBLA nor any other administrative forum was available to plaintiffs at the time of suit. Just as we should not penalize plaintiffs' strategy decision to contest the APD approval rather than the lease issuance by applying the doctrine of laches to bar this environmental claim, neither should we foreclose plaintiffs from having any forum to litigate their claim because that *same* strategy decision resulted in no appeal to the IBLA within thirty days of lease issuance. This circuit has held that the improbability of obtaining adequate relief by pursuing administrative remedies justifies dispensing with the exhaustion requirement. *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 850 (10th Cir. 1982).

Furthermore, deference to agency expertise is inapplicable in the NEPA context. The deference envisioned under this rationale is appropriate when the disputed issue is one expressly delegated to an agency that deals exclusively with the area and so has refined an expertise in its nuances. *All* federal agencies are required under NEPA to prepare an EIS if a proposed action meets the statutory criteria. No single agency has expertise in determining whether an EIS is statutorily mandated in a given instance. NEPA *imposes* duties on agencies; agencies do not exist to administer NEPA. Hence, courts are equally well-suited to examine the issue of whether a proposed action is a major federal action significantly affecting the environment.

Because ensurance of NEPA compliance is not within the special province of administrative agencies, executive and administrative autonomy and development of a factual record are likewise irrelevant considerations under NEPA. Simply put, the *McKart* factors apply in the prototypical case of an agency issuing an order within its delegated area of expertise that a potential plaintiff would rather dispute in the court system than with the particular agency.[3] Whether an agency needs to draft an EIS before pursuing a proposed action is unlike other administrative decisions. We are reticent to apply the traditional exhaustion doctrine to this untraditional administrative decision when the underlying goals which prompted the

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[3] The only case cited by the district court in supporting its holding fits within this traditional mold. In *Winkler v. Texoma Prod. Co.*, 758 F.2d 1360 (10th Cir.1985) (per curiam), plaintiff's action to quiet title to several oil and gas leases was dismissed for failure to exhaust administrative remedies. BLM notified plaintiff by letter that the leases were improperly issued and substituted another titleholder in its records. Rather than pursue an administrative appeal, plaintiff applied to the courts. Because the issue of legal title to federal oil and gas leases is squarely within BLM's duties and expertise, dismissal under the exhaustion doctrine was appropriate. However, *Winkler* does not compel the same result in this case.

doctrine's development would not be served thereby. Therefore, we hold that the district court erred when it ruled that the present action was barred under the exhaustion doctrine.

B.

We now reach the merits of plaintiffs' contention that BLM was required to prepare a comprehensive EIS prior to the issuance of this oil and gas lease of national forest land, because issuance of such a lease always constitutes a major federal action significantly affecting the quality of the human environment under NEPA. The district court held that BLM's publication of a FONSI with regard to lease issuance itself — not possible future drilling under it — was not arbitrary, capricious, or unreasonable. We do not approach this issue with a clean slate. A well-developed body of case law under NEPA, as well as considerations of public policy, must guide our analysis.

It is the stated public policy of the United States to make public lands, including national forest land, available for mineral leasing in an effort to reduce our energy dependence on foreign sources and to protect our national security. This policy is reflected in such legislation as the Federal Land Policy and Management Act, 43 U.S.C., §§ 1701-1784 (1982) and the Mineral Lands Leasing Act, discussed earlier, as well as section 100 of the Energy Security Act of 1979, 42 U.S.C. § 8701(b)(1), explicitly establishing a national policy to end dependence on foreign energy sources.

NEPA, too, reflects an important public policy of this nation: the avoidance of precipitous federal decision making at the agency level which may fail to adequately consider the environmental ramifications of agency actions. Although labeled an "environmental" statute, NEPA is in essence a *procedural* statute; it does "not require agencies to elevate environmental concerns over other appropriate

considerations." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 2252, 76 L.Ed.2d 437 (1983). NEPA requires only that an agency take a "hard look" at the environmental consequences of any major federal action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976). NEPA was designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978). Thus, the hybrid goal for this nation is to encourage the development of domestic oil and gas production while at the same time ensuring that such development is undertaken with an eye toward environmental concerns.

This informed decision-making process is realized through the preparation and publication of an EIS if any agency action is determined to be a "major" one "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). It is the agency's responsibility to initially determine the need for an EIS. *City of Aurora v. Hunt*, 749 F.2d 1457, 1468 (10th Cir.1984). Regulations require that "[i]n determining whether to prepare an environmental impact statement the Federal agency shall . . . prepare an environmental assessment . . . ." 40 C.F.R. § 1501.4(b) (1986). "An EA allows the agency to consider environmental concerns, while reserving agency resources to prepare full EIS's for appropriate cases. If a finding of no significant impact is made after analyzing the EA, then preparation of an EIS is unnecessary." *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120, 126 (D.C. Cir.1985).

[12-14] In this case, BLM prepared an EA exceeding 100 pages and evaluating the issuance of federal oil and gas leases in the Rocky Mountain region national forests. Based on this EA, BLM determined that, with appropriate lease stipulations aimed at protecting the environment,

lease issuance itself, essentially a paper transaction, does not usually require prior preparation of an EIS. In such a case, our role as a reviewing court is to examine whether the agency's conclusion that its actions will have no significant environmental consequences was a reasonable one.[4] *City of Aurora*, 749 F.2d at 1468; *Brandon v. Pierce*, 725 F.2d 555, 563 (10th Cir.1984). We may not "interject [ourselves] within the area of discretion of the execution as to the choice of the action to be taken." *Kleppe*, 427 U.S. at 410 n. 21, 96 S.Ct. at 2730 n. 21 (citation omitted). Moreover, the party challenging the agency's decision shoulders the burden of establishing that the FONSI was unreasonable. *Vieux Carre Property Owners, Residents & Assoc, Inc.*, 719 F.2d at 1279; *Township of Lower Alloways Creek*, 687 F.2d at 743. Finally, in deciding whether the agency's decision was reasonable, we must consider such

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[4] There is a notable split in the circuits as to the appropriate standard of review in evaluating whether an agency's determination to forego an EIS should be overturned. The Tenth aligns itself with the Third, Fifth, Eighth, and Ninth Circuits in adhering to a reasonableness standard. *See e.g., Jones*, 792 F.2d at 827; *Vieux Carre Property Owners, Residents & Assoc., Inc. v. Pierce*, 719 F.2d 1272, 1279 (5th Cir.1983); *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir.1982) (dicta); *Winnebago Tribe v. Ray*, 621 F.2d 269, 271 (8th Cir.), *cert. denied*, 449 U.S. 836, 101 S.Ct. 110, 66 L.Ed.2d 43 (1980). The First, Second, Fourth, and Seventh Circuits, on the other hand, subscribe to the standard articulated in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(1982): "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See, e.g., City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014, 1017 (4th Cir.1985); *City of West Chicago v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 651 (7th Cir.9 1983); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir.1980); *Cross-Sound Ferry Servs., Inc. v. United States*, 573 F.2d 725, 732 (2d Cir.1978).

The Supreme Court has thus far declined to settle the dispute. *See Gee v. Boyd*, 471 U.S. 1058, 105 S.Ct. 2123, 85 L.Ed.2d 487 (1985) (White, Brennan & Marshall, JJ., dissenting from denial of certiorari). Until the Court chooses to take the matter up, we perceive no reason to suggest *en banc* hearing to consider departure from our prior precedent.

mitigating measures as the lease stipulation imposed in this case so as to avoid untoward environmental consequences. *See Jones*, 792 F.2d at 829 ("conditions mitigating the environmental consequences of an action may justify an agency's decision not to prepare an environmental impact statement"); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir.1985) (mitigation measures may be considered and need not completely compensate for adverse environmental impacts for decision to forego EIS to be reasonable); *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1259, 89 L.Ed.2d 570 (1986); *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1373 (10th Cir.1980) (comprehensive environmental protection measures in lease found "quite significant and compelling in relation to compliance with the mandates of NEPA").

[15] We hold that plaintiffs failed to meet their burden, that BLM took the requisite "hard look" at the environmental consequences of oil and gas leasing, and that the FONSI was "within the bounds of reasoned decisionmaking." *Baltimore Gas & Elec. Co.*, 462 U.S. at 105, 103 S.Ct. at 2256. The oil and gas lease, by itself, does not cause a change in the physical environment. In order to work the lease, the lessee must submit site-specific proposals to the Forest Service and BLM who can then modify those plans to address any number of environmental considerations. Each action is subject to continuing NEPA review.

The issuance of the oil and gas lease in this case is analogous to the issuance of the mineral patent in *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir.), *cert. denied*, 449 U.S. 822, 101 S.Ct. 80, 66 L.Ed.2d 24 (1980). The Eighth Circuit there held that no EIS was required before issuance of the patent, because "the granting of a mineral patent does not enable the private party . . . to do anything." *Id.* at 1194. While the court recognized that the proposed mining project was substantial and noted the probable need for an EIS along the way, an EIS was not

required during the "germination process of a potential proposal." *Id.* at 1195 (quoting *Kleppe*, 427 U.S. at 401 n. 12, 96 S.Ct. at 2726 n. 12).

Even more compelling are the facts and conclusion found in *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982). The Forest Service there approved actual exploratory mineral *drilling* in the Cabinet Mountains Wilderness Area in Northwestern Montana without the preparation of an EIS. Thirty-six drill holes in twenty-two sites for *each* of four consecutive years were proposed and approved on the basis of an EA after stringent mitigating measures were imposed to offset the adverse effects of the drilling activities. We need not indicate any approval of such an extreme set of facts to decide the case before us; we cite that case only by way of contrast to the facts before us. In the present case, we are dealing not with wilderness area but with multiple-use land, and an EIS *was* prepared prior to the exploratory drilling at the North Fork Well.

Moreover, we do not agree that our prior precedent in *Davis v. Morton*, 469 F.2d 593 (10th Cir.1972), dictates a contrary conclusion. The major issue in that case was whether the lease of Indian land to a corporation constituted a "federal" action, triggering NEPA. We held that it did and therefore an EIS was required. However, in that case, there were firm plans to develop the land subject to the lease. A small city with 15,000 residents was envisioned. The underlying project was well articulated — unlike the prototypical oil and gas lease. *See infra*. *Davis* does not stand for the proposition that an EIS is required *whenever* the Federal Government leases land.

The plaintiffs argue that an EIS must be prepared at the leasing stage because of the eventual cumulative and foreseeable effects of exploratory drilling and then full field development. Such effects, they argue, must be considered at the leasing stage, else they can never be adequately considered and addressed. We concede that

" '[s]egmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action has been held to be unlawful.' " *National Wildlife Fed'n v. Appalachian Regional Comm'n*, 677 F.2d 883, 890 (D.C.Cir.1981) (quoting *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981)); *see also City of West Chicago*, 701 F.2d at 650 ("piece-mealing" allows agency to evade NEPA requirements "by segmenting an overall plan into smaller parts involving action with less significant environmental effects").

This argument would have more force in this context if full field development were likely to occur and could be specifically described at the leasing stage. The paradigmatic oil and gas lease, however, does not fall into such a category. Full field development is typically an extremely tentative possibility at best at the leasing stage. Because "exploration activities are conducted on only about one of ten federal leases issued and development activities are conducted on only one of ten of those leases on which exploration activities have been approved and completed," Intervenors' Answer Brief at 45-46, the steps from leasing to full field development are not "so interdependent that it would be unwise or irrational to complete one without the others" — the benchmark signaling the need for a cumulative impact EIS. *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir.1983)(citing *Sierra Club v. Froehlike*, 534 F.2d 1289, 1297-99 (8th Cir.1976) and *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir.1974)). To require a cumulative EIS contemplating full field development at the leasing stage would thus result in a gross misallocation of resources, "would trivialize NEPA and would 'diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.'" *Cabinet Mountains Wilderness*, 685 F.2d at 682 (quoting *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C.Cir.1979), *cert. denied*,

445 U.S. 915, 100 S.Ct. 274, 63 L.Ed.2d 599 (1980)). NEPA's goal is not to generate paperwork evaluating speculative possibilities that the odds favor will never occur. "[A]n EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*." *Weinberger v. Catholic Action*, 454 U.S. 139, 146, 102 S.Ct. 197, 203, 70 L.Ed.2d 298 (1981)(emphasis in original).

This is not to say that drilling or development at a single site will never require an overall assessment. On the contrary, an APD for a specific site may trigger the need for a broader-based EIS, evaluating both the past and future environmental effects of the site-specific drilling, as well as the regional cumulative effects of drilling a particular site in light of other regional development. The regulations define "cumulative impact" as

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (1986). As an overall regional pattern or plan evolves, the region-wide ramifications of development will need to be considered at some point. A singular, site-specific APD, one in a line that prior to that time did not prompt such a broad-based evaluation, will trigger that necessary inquiry as plans solidify. We merely hold that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry.

Pragmatic considerations as well as more informed environmental decision making under NEPA dictate our result. During fiscal year 1984, the last year for which published information is available, the United States issued 5,478 oil and gas leases. "The entire Department of

the Interior, comprised not only of the oil and gas section of the BLM, but also other BLM divisions and a handful of other agencies such as the Office of Surface Mining, the Bureau of Indian Affairs, the National Park Service, and the Fish and Wildlife Service, prepared only 115 EISs during 1984," only about two percent of the EISs that would be required were we to hold that preparation of a comprehensive EIS is mandatory prior to every oil and gas lease issuance. Intervenor's Answer Brief at 44-45. The expenditure in terms of tax dollars, manpower, and time involved in preparing an EIS is substantial. *Cf. supra* note 2 and accompanying text. Of course, such considerations are not dispositive of the legal requirements under NEPA. They do, however, become persuasive when one considers that the boilerplate EIS that would likely result in the absence of site-specific proposals at the leasing stage would not measurably improve the decision-making process.

The tiered approach to environmental review, generally condoned in the regulations, *see* 40 C.F.R. §§ 1502.20, 1508.28 (1986), is calculated to provide the most informed decision making possible in oil and gas leasing. When BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken. Only then can BLM determine whether a river system is implicated, where access will be needed and how it should be accomplished, and which wildlife is affected. In short, the specificity that NEPA requires is simply not possible absent concrete proposals.

In this circuit, a rational basis test is applicable in determining whether the time is ripe for an EIS that eventually

will clearly be required.[5] *Colorado River Water Conservation Dist. v. United States*, 593 F.2d 907, 909 (10th Cir. 1977). "Certainly the project must be of sufficient definiteness before an evaluation of its environmental impact can be made and alternatives proposed." *Id.* at 910 (quoting *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233, 1237 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021, 93 S.Ct. 458,34 L.Ed.2d 313 (1972)). To require a cumulative EIS at the leasing stage in this particular case would be tantamount to "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet unchartered in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined." *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1379 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1238, 55

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[5] There is a subtle, but significant, distinction between reviewing an agency's determination that its action does not constitute a major federal action significantly affecting the quality of the human environment, thus dispensing with the need for an EIS, and reviewing an agency's timing decision with respect to preparation of an EIS admittedly required because the overall project concededly does comprise an action subject to NEPA. The former case requires the more stringent "reasonableness" standard of review, because federal action may forever escape environmental scrutiny. The latter scenario justifies the lower "rational basis" scrutiny because of the assurance that the environmental consequences of an action will enter the decision-making process at some point; merely the timing is at issue.

The inquiry with respect to an oil and gas lease does not fall indisputably within one category rather than the other. If no exploration under the lease is ever pursued, determining whether an EIS is required at the lease issuance stage falls within the first category. If oil or gas is found and development undertaken, an EIS is clearly required, and determining whether that EIS should issue at the leasing stage becomes merely a timing question. The difficulty in oil and gas leasing, of course, is that one cannot predict which path will eventually be taken at the leasing stage. We have thus considered both possibilities herein and conclude that in neither context is an EIS required at the leasing stage absent firm plans to develop.

L.Ed.2d 764 (1978). Because only one of ten leases results in any development, "the additional information would at best amount to speculation as to future event or events [and] obviously would not be of much use as input in deciding whether to proceed." *Id.* at 1378.

Therefore, in light of the substantial EA, of the mitigating lease restrictions requiring further environmental appraisal before any surface disturbing activities commence, of the nebulousness of future drilling activity at the time of leasing, and of the continuing supervision of the federal agencies involved over future activities, the agency's decision in this case that the lease issuance itself was not a major federal action significantly affecting the quality of the human environment was not unreasonable. Furthermore, there clearly was a rational basis to defer preparation of an EIS until a more concrete proposal was submitted to BLM.

The district court's denial of a preliminary injunction and its order dismissing this suit are both AFFIRMED.